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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 935

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, BROTHERHOOD OF RAILROAD TRAINMEN, and SWITCHMEN'S UNION OF NORTH AMERICA,
Petitioners,

v.

CERTAIN CARRIERS REPRESENTED BY THE EASTERN, WESTERN, AND SOUTHEASTERN CARRIERS' CONFERENCE COMMITTEES, CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY, ET AL. *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

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OCTOBER TERM, 1963

No.

Brotherhood of Locomotive Firemen and Enginemen, Brotherhood of Railroad Trainmen, and Switchmen's Union of North America, *Petitioners*,

v.

Certain Carriers Represented by the Eastern, Western, and Southeastern Carriers' Conference Committees, Chicago, Burlington & Quincy Railroad Company, The Denver and Rio Grande Western Railroad Company, Chicago and North Western Railway Company, Missouri Pacific Railroad Company, Southern Pacific Company, Union Pacific Railroad, Seaboard Air Line Railroad Company, The New York Central Railroad Company, The Baltimore & Ohio Railroad Company, Richmond, Fredericksburg, and Potomac Railroad Company, The Chesapeake and Ohio Railway Company, Atlantic Coast Line Railroad Company, the Pennsylvania Railroad Company, individually and as representative of certain other carriers, Ralph T. Seward, individually and as representative of Arbitration Board No. 282, Robert F. Kennedy as Attorney General of the United States and the United States, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Brotherhood of Locomotive Firemen and Enginemen, the Brotherhood of Railroad Trainmen, and

the Switchmen's Union of North America, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled case on February 20, 1964, Court of Appeals Nos. 18,331 and 18,332.

OPINIONS BELOW

The opinion of the Court of Appeals and the opinion of Judge J. Skelly Wright concurring in part and dissenting in part (Appendix A, *infra*) have not yet been officially reported. They are unofficially reported in 55 LRRM 2517. The opinion of the District Court (Appendix C *infra*) is reported in 225 F. Supp. 11 (1964).

JURISDICTION

The judgment of the Court of Appeals was entered on February 20, 1963, and is appended hereto as Appendix B *infra*. Jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether a federal district court of one judge had jurisdiction to enter final judgment in a suit to enjoin on grounds of repugnance to the Constitution of the United States the enforcement, operation and execution of a federal statute and the award of an arbitration board rendered thereunder.

2. Whether Question 3 listed below presents substantial constitutional issues for the purpose of convening a three-judge federal district court.

3. Whether Public Law 88-108, as construed by the courts below, or the award issued thereunder, deprives

employees of liberty or property without due process of law by taking away their rights under existing collective bargaining agreements and their right to strike and requiring them to accept instead terms and conditions of employment fixed by an *ad hoc* arbitration board, in that, (a) the employees never agreed to the arbitration nor the award issued, (b) the arbitration board was not established by Congress as a regulatory administrative agency and did not meet the constitutional requirements for such an agency to which Congress could (if it had purported to do so) delegate the legislative power inherent in the establishment of terms and conditions of employment by government decree, and (c) the action of the board was not subjected to constitutionally requisite judicial review.

4. Whether Public Law 88-108 confined the jurisdiction of the arbitration board to finding and including in its award all agreements of the parties and deciding only the points of disagreement remaining after the issues had been narrowed by the agreements reached during the prior negotiations.

5. Whether the award of the arbitration board exceeded the jurisdiction conferred on the board because the board ignored agreements of the parties, resolved issues which had already been resolved by agreements of the parties during the prior negotiations, and included in its award decisions differing materially from agreements made by the parties.

6. Whether the courts should set aside the award because it is not based on findings of fact concurred in by a majority of the arbitration board or because the findings of the neutral members are not supported by substantial evidence.

7. Whether the award of the arbitration board exceeded the jurisdiction conferred on the board by redelegating to special boards of adjustment the determination of crew consist in yard service and on branch lines in road service, instead of the arbitration board itself making the determination.

STATUTES INVOLVED

Public Law 88-108, 77 Stat. 129, is set forth in Appendix D, *infra*. The relevant provisions of the Railway Labor Act, 45 U.S.C., 151 *et seq.* 48 Stat. 1185, are set forth in Appendix E, *infra*. Section 13 of the Railway Labor Act of 1926, 44 Stat. 577, 587 is set forth in Appendix F, *infra*. 28 U.S.C. 1254(1), 62 Stat. 928, together with earlier statutes showing the relevant legislative history, is set forth in Appendix G, *infra*.

STATEMENT

This Court in the case of *Brotherhood of Locomotive Engineers v. Baltimore & Ohio Railroad*, 372 U.S. 284 (1963), had before it an earlier aspect of the dispute between the carriers and the petitioners, which is still unresolved and as to part of which the present case presents a later effort at resolution.

The two cases decided by the courts below which petitioners now seek to bring before this Court for review are: one case docketed in the District Court as Misc. No. 41-63 and in the Court of Appeals as No. 18,331, consisting of the proceeding in which the award of Arbitration Board No. 282 (JA 8-29)[1] was filed in

[1] "JA" denotes the "Consolidated Joint Appendix" as filed in the Court of Appeals. One certified and nine uncertified copies have been filed with the Clerk of this Court for use in the consideration of this petition for a writ of certiorari.

the office of the Clerk of the District Court in conformity with Section 9 of the Railway Labor Act (Appendix E, *infra*); another case docketed in the District Court as Civil Action No. 2919-63 and in the Court of Appeals as No. 18,332 instituted by the filing in the District Court of a "Petition to impeach and contest award of Arbitration Board, for declaratory judgment, and for injunctive relief" (JA 271 A-271-O).

The award of Arbitration Board No. 282 (JA 8-29) was rendered pursuant to Public Law 88-108, (Appendix D, *infra*) enacted by Congress on August 28, 1963, for the express purpose of avoiding a strike over various issues in dispute between petitioners and the carriers. Section 1 of said public law forbade a strike over any matters in dispute under notices served by the carriers on November 2, 1959 and notices served by petitioners and other labor organizations on September 7, 1960. Section 2 provided for the establishment of an arbitration board to be composed of seven members, two to be named by the carriers, two by the labor organizations, and the other three to be selected by the four members chosen by the parties or in the event they cannot agree, then the three additional members to be named by the President. Section 3 directed the Secretary of Labor to furnish the arbitration board with copies of his statement to the parties of August 2, 1963, together with memorandums and other data setting forth the matters with respect to which the parties were in tentative agreement and the extent of disagreement as to matters on which there was no tentafive agreement.

Section 3 further provided that the arbitration board should make a decision as to what disposition should be made of those portions of the carriers' no-

tices of November 2, 1959 and the organizations' notices of September 7, 1960, dealing with the firemen issue and the train crew consist issue. The arbitration board was directed to incorporate in its decision any matters as to which it finds the parties were in agreement and to resolve matters on which the parties were not in agreement. Section 4 provided that the arbitration shall be conducted and the award made and filed pursuant to Sections 7, 8 and 9 of the Railway Labor Act.

The arbitrators named by the parties having been unable to agree, the President named the three neutral members of the arbitration board, designated as National Mediation Board Arbitration Board No. 282. The Arbitration Board conducted hearings in which the petitioners and the two other labor organizations representing operating employees and representatives of some 200 railroads, including most of the major railroads in the United States, participated (JA 35).

The Secretary of Labor, in accordance with the provisions of Section 3 of Public Law 88-108 (Appendix D, *infra*), on September 23, 1963 provided Arbitration Board No. 282, with two documents each entitled "Memorandum," dealing respectively with "The Firemen (Helpers) Issue" (JA 133-139) and "The Crew Consist Issue" (JA 225-228), which detailed negotiations of the parties with respect to an August 2, 1963 proposal for settlement made by the Secretary of Labor, summarized the extent of agreement, tentative agreement, and disagreement which developed, and

transmitted as attachments relevant exhibits (JA 140-224, 229-271).[2]

On November 28, 1963, Arbitration Board No. 282 filed an award made by the three neutral members and concurred in by the two carrier members (JA 8-29). The three neutral members filed an opinion in support of the award (JA 31-88). The two carrier members did not concur in any respect in the opinion of the neutral members but filed a separate statement expressing their disappointment in the award (JA 89-91). There were no findings of fact made formally and if any of the statements in the opinion of the three neutral members could be treated as findings, none of these statements received the concurrence of a majority of the seven members of the Arbitration Board.

With respect to the firemen issue the award provided that within seven days following the effective date of the award, each carrier covered by the award shall have the right to give the local chairman of the firemen on each seniority district, lists of the engine crews, within his respective seniority district, which in the carrier's judgment "based on considerations of safety, undue work burden, and adequate and safe

[2] Among other things he showed agreement that firemen jobs be abolished only when a vacancy required a new hire and no danger or undue burden ensued, the sequence in which agreed-upon categories of jobs should be abolished, categories of jobs not requiring case by case review of safety or burden and determination as to the safety or burden as to other jobs by special boards of adjustment (JA 137-138, 141-45). Although reporting disagreement as to the reviewability of yard crews (JA 227-228) he attached a carrier-prepared statement of position dated August 11, 1963 stating carrier agreement to nonreviewability of yard crews of one conductor and two brakemen (JA 260-264, Tr. 4801-4802).

transportation service" do not require a fireman (JA 12). Within thirty days thereafter, each local chairman shall have the right, based on like considerations, to designate not more than 10 percent of engine crews listed by the carrier as crews in which the carrier shall be required to continue to use a fireman (JA 12-13). At three-month intervals following the date of the carrier's original lists, carriers may give additional such lists and in turn the local chairmen may give such counter lists (JA 13-14). After the expiration of 37 days following the effective date of the award, carriers are not required to use firemen in freight or yard service other than in the crews designated by local chairmen as provided in the award except as necessary to provide jobs for firemen whose employment rights are retained under other provisions of the award and except that no yard locomotive is to be operated without a fireman unless it is equipped with an effective dead man control (JA 14). The award did not provide for any review of the carrier's listings, except that it allowed 10 percent of each list to be cancelled by the union.

With respect to employment rights of firemen the award completely wiped out all employment rights of firemen with less than two years seniority and of firemen with more than two years seniority who earned less than $200 during the preceding two years and restricted the employment rights of other firemen by requiring firemen of less than ten years seniority to lose all employment rights unless they accept any comparable job offered them by the carrier in any seniority district and by depriving firemen of more than ten years seniority of jobs which the carrier may discontinue pursuant to the award if other employ-

ment in any class of engine service for which they are qualified is available to them in their respective seniority districts (JA 19-20).

With respect to the train crew consist issue, the award required the carriers and the organizations to submit to decision by a special board of adjustment to be established for each job, disputes which may from time to time arise as to the number of trainmen to be employed in road service where the present practice or rule requires more or less than two trainmen, as to the number of trainmen to be employed on branch lines, and as to the number of brakemen or helpers to be used in yard service (JA 22-23). The award wiped out all rights of furloughed trainmen or brakemen whose jobs were found unnecessary by the special boards of adjustment and restricted the rights of other trainmen or brakemen whose jobs were found to be unnecessary by requiring each of them to take other available employment in his seniority district for which he is qualified (JA 27-28).

The petition in No. 18,332 (JA 271 A—271 O) was filed by the parties who are petitioners here. These organizations represent locomotive firemen, trainmen and brakemen employed by the railroads named as defendants and the other railroads represented by the defendant railroads (JA 271 A). The chairman of Arbitration Board No. 282 and the Attorney General of the United States were also named as defendants (JA 271 B, 303, 368). The petition was in two counts. Count I (JA 271 A—271 G) contained a statutory impeachment proceeding filed pursuant to Section 4 of Public Law 88-108 (Appendix D, *infra*) and Section 9, Second of the Railway Act (Appendix E, *infra*) to set aside the award of Arbitration Board

No. 282 as invalid because it was in excess of the jurisdiction and authority conferred on the board in that the award failed to include agreements reached by the parties, resolved matters on which the parties were not in disagreement, resolved some of them in a manner contrary to the agreement of the parties and as to others directed the parties to submit to further compulsory arbitration (JA 271 E—271 G). The petition alleged that the parties had agreed jobs should be eliminated by the process of attrition whereas the award provided for the elimination of jobs other than through attrition (JA 271 E); that the parties had agreed to seven matters concerning the elimination of firemen jobs whereas the award did not include any of these agreements (JA 271 F); that the parties had agreed to the nonreviewability of yard crews of one conductor and two brakemen whereas the award made such jobs reviewable (JA 271 F—271 G); that the parties had agreed that the compensation and expenses of the neutral members of special boards of adjustment should not be borne by the parties whereas the award imposed such expense and compensation on the parties (JA 271 F); that instead of resolving disagreements as to train crew consist, the award required both areas of disagreement as well as areas in which the parties had agreed to be submitted to further compulsory arbitration by special boards of adjustment (JA 271 E).

Count II (JA 271 G—271 K) sought a declaration of the constitutional invalidity of Public Law 88-108 under the Fifth Amendment to the Constitution of the United States and injunctive relief against the operation, execution or enforcement of Public Law 88-108 by putting the award in effect, if the award

was not impeached and set aside as prayed in Count I. It is alleged that Public Law 88-108 is enforceable by the Attorney General (JA 271 G) and compelled the petitioners and the employees they represent to submit to binding arbitration terms and conditions of employment, without their consent (JA 271 H); that the arbitration board established by said law had issued an award making drastic revisions without the consent of employees in the terms and conditions of employment contained in collective bargaining agreements now in effect (JA 271 H); and that hundreds of employees represented by petitioner face "imminent loss of their jobs, and the vested contractual seniority rights of many other employees will be impaired with loss of job opportunities and diminished ability to maintain earnings" (JA 271 I). The petition alleges that unless an injunction issues the employees are threatened with "imminent and irreparable" invasion of rights protected by the Constitution of the United States (JA 271 J).

The United States moved for and was granted leave to intervene as a party defendant in Civil Action No. 2919-63.

Answers were filed by all the defendants denying a number of the allegations of the petition (JA 272-278, 298-303). Both the carriers and the United States in their answers admitted that the award provided for the elimination of jobs otherwise than through attrition (JA 274, 299). The carriers likewise admitted that the arbitration board did not incorporate in its award all of the provisions of the agreement and tentative agreement respecting the submission of certain matters to special boards of adjustment with the costs and expenses of the neutral member to be assumed by

the National Mediation Board (JA 274) and that the guidelines for the special boards of adjustment which were provided in the award differed in some respects from those tentatively and qualifiedly agreed upon by the parties (JA 274-275).

Motions for summary judgment were filed by the petitioners and by all the defendants (JA 311-313).

A motion for the convening of a three-judge district court pursuant to 28 U.S.C. Sec. 2282 was duly made by the petitioners (JA 310, 326).

A one-judge district court denied the motion for a three-judge court (JA 329) and granted the motions of the defendants for summary judgment in the defendants' favor dismissing the action (JA 393).

The denial of the motion for the convening of a three-judge district court was initially based only on the ground that a three-judge court "is required only where an injunction is sought against a government agency to restrain that agency from enforcing a statute claimed to be unconstitutional." (JA 321). Later in the formal opinion of the court this action was described as based "on the ground that the action was not for an injunction, but for a decree impeaching and setting aside the award and that the prayer for an injunction was surplusage" (JA 386). Later still in the opinion, the court also stated that the "court would have been justified in denying the motion for the convening of a three-judge court on the ground that no substantial constitutional question is presented, as well as on the procedural ground on which it acted" (JA 391).

The court held that its scope of judicial review was "exceedingly limited and narrow" (JA 378); that it

could "consider only whether the award conforms to the requirements" of Public Law 88-108 (JA 378); that it could not review the substantiality of the evidence (JA 378), that the "findings are not subject to review" (JA 383), but that, in any event, petitioners had not shown "that any specific finding of fact is not supported by substantial evidence" (JA 379) or that any finding was "erroneous" (JA 383).

With respect to the meaning of the provisions of Public Law 88-108 directing the Arbitration Board to incorporate in its award the agreements of the parties, the court held that the statute did "not command the board to adopt such agreements" (JA 381); that "the purpose of the clause was to point the attention of the board to any agreements reached in order that the board might give them due weight, but not to limit its discretion in arriving at a final decision" (JA 381-382); that "the board was not bound by agreements made by the parties" (JA 385). Accordingly, the court deemed it immaterial that the Arbitration Board did not include in its award the admitted agreement of the parties that the compensation and expenses of neutral members of special boards of adjustment be borne by the National Mediation Board (JA 385). In addition the court stated that this agreement of the parties was "a nullity" because no one is authorized to bind the National Mediation Board to make such payments (JA 385).

The court rejected the contention that the board did not comply with the direction in Section 3 of Public Law 88-108 to the Arbitration Board to make a complete and final disposition of the dispute when instead of resolving the crew consist issue, the award provided for future compulsory arbitration of this

issue on a job by job basis by numerous special boards of adjustment. The court held that the Arbitration Board had "constructed machinery for the disposition" of the issues and that the construction of such machinery "must be deemed in essence to constitute a complete and final disposition of the issues" (JA 384).

The attack on the constitutionality of Public Law 88-108 was rejected on the ground that compulsory arbitration is not an innovation but rather the Railway Labor Act, by the creation of the National Railroad Adjustment Board, has "provided for compulsory arbitration of minor disputes" as far back as 1926 and "countless proceedings of this nature have been conducted under it over the years" (JA 389).

Public Law 88-108 was held to constitute a proper delegation by Congress of legislative power (JA 388-389). Adequate standards for the exercise of this delegated legislative power were found by the district court in the provisions of Section 7 that the Arbitration Board should give due consideration to the effect of the proposed award upon "adequate and safe transportation service to the public" and upon the "interests of the carrier and employees affected" giving "due consideration to the narrowing of the areas of disagreement which has been accomplished in bargaining and mediation" (JA 390).

On appeal, the court of appeals affirmed in a per curiam opinion with Judge Wright concurring in part and dissenting in part (Appendix A, *infra*). Affirmance was predicated on the opinion of the district court. The majority of the court added that a three-judge district court was not required because of a

supposed absence in the pleadings of any allegation that enforcement of the unconstitutional statute is threatened or imminent and because of a supposed stipulation of the parties "that nothing would be done to effectuate the award before the termination of litigation". The majority of the court also held the denial of the three-judge court was proper because no substantial constitutional question was presented.

Judge Wright dissented as to the denial of a three-judge court, believing that the constitutional issues were clearly substantial.

REASONS FOR GRANTING THE WRIT

1. The One-Judge Court was Without Jurisdiction to Grant the Defendants' Motions for Summary Judgment and to Dismiss the Complaint

The decision below requires review by this Court in the exercise of its supervisory jurisdiction over the lower federal courts to confine them to the exercise of power strictly within their jurisdiction.

Count II of the complaint sought a declaration that P.L. 88-108 and the Award were unconstitutional, stated that its purpose was to obtain an injunction against the application of the Award (JA 271 G), and prayed for a preliminary injunction pending determination of plaintiffs' right to a permanent injunction. (JA 271 K). Since P.L. 88-108 provided that the Award should be put in effect, such an injunction would have restrained the operation of the statute.

28 U.S.C. § 2282 provides:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be

granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

The district court denied petitioners' motion for a three-judge court, stating that Section 2282 applied only to cases in which an injunction was sought against an agency or officer of the Government. (JA 321). None of the defendants opposed the convening of a three-judge court for any reason other than the alleged insubstantiality of the constitutional questions. That Section 2282 is not limited to cases in which an injunction is sought against an officer of the United States is apparent when one compares the language of that section with 28 U.S.C. § 2281, the parallel provision with respect to injunctions against the operation of a state statute. Section 2281 specifically limits its provision for a three-judge court to cases in which an injunction is sought "restraining the enforcement, operation or execution of any State statute *by restraining the action of any officer of such State* . . ." These italicized words are significantly omitted from Section 2282. Both sections were enacted the same day, use parallel language except for the words italicized above, and appear at 62 Stat. 968. Congress obviously and deliberately intended that section 2282 be not limited to cases seeking injunctions against federal officers or agencies. This Court has expressly held that this difference in language was deliberate, and that Section 2282 applies although none of the parties is a public officer. *Coffman* v. *Breeze Corp.*, 323 U.S. 316, 317-18 (1945).

Section 2282 therefore applies when an injunction is sought that would restrain the enforcement, opera-

tion, or execution of an Act of Congress for repugnance to the Constitution, regardless of who it is that would be restrained. Here the Attorney General was joined as a defendant (JA 271 G), because Section 7 (b) of P.L. 88-108 makes the obligations of the Act enforceable upon suit by the Attorney General.

Later, in its opinion, the district court described its refusal to convene a three-judge court, as based on the ground that the prayer for an injunction was surplusage and that the relief sought "was substantially in the nature of a declaratory judgment" (JA 386), relying on three cases, none of which is applicable. We discuss these cases briefly.

Int'l Ladies' Garment Workers' Union v. Donnelly Garment Co., 304 U.S. 243 (1938) has repeatedly been distinguished on this issue and was distinguished in *Coffman v. Breeze Corp., supra.* The *Donnelly* case, as has repeatedly been pointed out, did not involve an effort to restrain the operation of a federal statute; although the validity of a federal statute was drawn in question, that is not enough for a three-judge court. As this Court explained in the *Coffman* case, the injunction sought in *Donnelly* was not against operation of a statute, but was against a strike.

Thompson v. *Whittier*, 365 U.S. 465 (1961), sought not an injunction but the setting aside of a ruling of the Veterans Administration that the plaintiff was disqualified for a pension. *Thompson* v. *Whittier*, 185 F. Supp. 306 (D.C. D.C., 1960). This Court held only that a direct appeal to this Court did not lie since the three-judge court was not required.

In *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 (1963) this Court held that a three-judge court was

not required (pp. 152-55) although the complaint as amended before the third trial contained a prayer for injunction, because injunctive relief had not theretofore been sought and was not pursued even in the third trial.

This Court indicated in *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U.S. 713 (1962) that where a three-judge district court has been improperly denied it is a proper function of the Court of Appeals to correct the error and application to this Court for writ of mandamus is no longer the exclusive remedy.

A single-judge district court has no jurisdiction to make any order except to refer to a three-judge court any case to which Section 2282 is applicable. This is true irrespective of the merits of the case. In *Schneider* v. *Rusk*, 372 U.S. 224 (1963), this Court (at p. 225) held that the constitutional questions "were not plainly insubstantial" and held the single-judge district court "powerless" to dismiss the action on the merits. To the same effect see *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U.S. 713, 715 (1962); *Stratton* v. *St. Louis S.W.R. Co.*, 282 U.S. 10, 15 (1930); and *Wolf* v. *Boyd*, 9th Cir., 1961, 287 F. 2d 520.

Even if the constitutional question may not be reached in making a final decision, a three-judge court is required. The same is true even though the complaint fails to state a cause of action for injunctive relief or even a justiciable controversy. *Coffman* v. *Breeze Corp., supra; Florida Lime & Avocado Growers* v. *Jacobsen*, 362 U.S. 73, 76-85 (1960).

Although the court of appeals based its affirmance on the opinion of the district court, it added, with respect to the three-judge court requirement, that the

complaint was lacking in the essential allegation of threat or imminence of enforcement and that in fact it had been told that the parties had stipulated that nothing would be done before termination of this litigation. The court was mistaken in both respects.

The petition in the district court, after having alleged in detail the nature and extent of the invasion of rights of employees represented by the plaintiffs, alleges specifically in Count II, paragraph 13, that the theretofore alleged damage and injury and invasion of rights are imminent and irreparable. (JA 271 J). Although the answer of the carrier defendants denied generally the allegations of Count II, paragraph 13 of the petition, it stated in paragraph 14 that "the changes in terms and conditions of employment provided by the Award of the arbitration board will become effective as provided by law and in said Award" (JA 278).

There was a stipulation between one of the petitioners, the Brotherhood of Locomotive Firemen and Enginemen, and the carrier defendants, made after the district court decision as a substitute for seeking an interim stay of action under that decision, deferring action under the award adversely affecting the employment of firemen until ten days after the decision of the court of appeals. There is now a generally similar stipulation between the same parties deferring such action until ten days after this Court's action on this petition. The former stipulation was not mentioned in the court of appeals by counsel for either of the parties to it; the court apparently inferred its erroneous impression of it from a statement in argument of counsel for the United States, which was not a party

to it. The other two petitioners here have never been party to any such stipulation and in fact the carriers are currently proceeding under the award as to them.

2. The Constitutional Challenge to the Validity of P.L. 88-108 and the Award is Substantial for Purposes of Convening a Three-Judge Court

We do not elaborate this point here, since we show in the next point that the statute and award do in fact invade important constitutional rights.

3. This Case Presents an Important Question of Constitutional Law which Ought to be Decided by this Court

Count II of the petition in the district court attacks P.L. 88-108 and the award issued thereunder as invading rights which petitioners are guaranteed under the First and Fifth Amendments. (JA 271 G—271 J).

The issues here presented far transcend the invasion of the constitutional rights of the 200,000 employees represented in this case (JA 35). We believe Congress here abdicated its responsibility to determine the federal government's policy as to how employees adversely affected by technological advance shall be protected. Instead of laying down a federal policy, Congress in effect told the President to go get any three men he wanted to decide the case, if the parties could not agree on three men. Congress thus disposed of this problem in a manner inconsistent with our form of government. If Congress can do this with respect to a labor problem, a precedent for abdication as to any other issue will be established.

The violation of due process of law which inheres in the statutory scheme here adopted for the compul-

sory arbitration of the terms and conditions of employment is evident once it is realized that Congress by Public Law 88-108 imposed all the basic features of "arbitration" as that term is usually used, except the all important ingredient of consent of the parties,[3] and did not set up an administrative agency to determine terms and conditions of employment. Since arbitration by definition is the decision of a dispute by a person chosen by the parties with the intent to substitute an honest exercise of the arbitrator's uncontrolled discretion as to how the dispute should be decided for the available legal process,[4] arbitration imposed on the parties against their will is a contradic-

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[3] In *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574, 582 (1960), this Court stated: "* * * arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." To the same effect see *Drake Bakeries, Inc.* v. *Local 50, American Bakery & Confectionery Workers*, 370 U.S. 254, 256-257 (1962); *Boyden* v. *Lamb*, 152 Mass. 416, 25 N.E. 609 (1890); *Franklin Needle Co.* v. *American Federation of Hosiery Workers*, 99 N.H. 101, 105 A. 2d 382, 384 (1954).

[4] Arbitration "is a contractual method for settling disputes in which the parties create their own forums, pick their own judges, waive all but limited rights of review or appeal, dispense with the rules of evidence, and leave the issues to be determined in accordance with the sense of justice and equity that they may believe reposes in the breasts and minds of their self-chosen judges." *Matter of Spectrum Fabrics Corp.*, 285 App. Div. 710, 714-715, 139 N.Y.S. 2d 612, 617, affirmed 309 N.Y. 709, 128 N.E. 2d 416 (1955).

"Broadly and generally speaking an arbitration is a contractual proceeding by which the parties to a controversy or dispute, in order to obtain a speedy and inexpensive final disposition of the matters involved, voluntarily select arbitrators or judges of their own choice and by consent submit the controversy to such tribunal for determination in substitution for the tribunals provided by the ordinary processes of the law." 6 C.J.S. Arbitration and Awards, § 1, p. 152.

tion in terms.[5] The use of the term "arbitration" in Public Law 88-108 served only to negative the applicability of legal principles and commit decision to the uncontrolled discretion of whomever should be chosen to serve as the Arbitration Board. Hence Public Law 88-108 substitutes a government by men for a government by laws. This violates due process of law. "For, the very idea that one man may be compelled to hold * * * the means of living * * * at the mere will of another, seems to be intolerable in any country where freedom prevails, as being, the essence of slavery itself." *Yick Wo* v. *Hopkins*, 118 U. S. 356, 370 (1886).

The courts below treated the case as presenting the issue of whether the government could constitutionally fix terms and conditions of employment and held that it could (JA 386-389, Appendices A and C, *infra*). None of the parties argued below that the government lacked this power in proper cases and under proper circumstances because it seemed so clear that whatever the powers of the government in this regard, those powers must be exercised either by Congress itself fixing the terms and conditions of employment as was done in the statute sustained in *Wilson* v. *New*, 243 U.S. 332 (1917) or by establishing an administrative agency, with all the legal protections which the Constitution requires. Committing the fixing of terms and conditions of employment to the arbitration process, but omitting the element of consent of the parties which is the essential ingredient for making arbitra-

[5] In *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574, 581 (1960), this Court quoted from Harry Shulman, Reason, Contract and Law in Labor Relations, 68 Harv. L. Rev. 999, 1016, that an arbitrator "is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept."

tion permissible, so clearly violates due process of law, as to obviate the necessity of considering to what extent, if at all, the Constitution permits Congress to abolish the right to collective bargaining, and to strike, by establishing another method of determining wages, hours and conditions of employment.

In the three state cases where the issue has been raised the state supreme courts in opinions written by distinguished jurists have held that statutes for the compulsory arbitration of terms and conditions of employment are unconstitutional as constituting the delegation of legislative power without adequate standards. *Van Riper* v. *Traffic Tel. Workers' Fed. of New Jersey*, 2 N.J. 335, 66 A. 2d 616, 9 A.L.R. 2d 854 (1949), opinion by Chief Justice Vanderbilt; *State ex rel. Everett Fire Fighters* v. *Johnson*, 46 Wash. 2d 114, 121, 278 P. 2d 662 (1955), opinion by Justice Schwellenbach; *Transport Workers Union* v. *Circuit Judge*, 322 Mich. 332, 348, 34 N.W. 2d 71 (1948), opinion by Chief Justice Bushnell. In the *Van Riper* case the Supreme Court of New Jersey stated (2 N.J. at pp. 353-354):

> "* * * in the absence of standards, the very term 'board of arbitration' carries with it the implication that the board will act in the way that arbitrators customarily act, not according to established criteria but according to the ideas of justice or of experience of the individual arbitrators. Anyone who has had experience with arbitration realizes that this is the inherent weakness of arbitration as a remedy. Unless standards are set up in any submission to arbitration the tendency to compromise and be guided in part by expediency as distinguished from objective considerations and real right is inevitable. This is especially dangerous in the case of an arbitration

where the rights of third parties, here the public, are concerned. * * *

"Standards of delegation are peculiarly required, moreover, where the legislature is enacting a new pattern of social conduct, *Panama Refining Co. v. Ryan*, 293 U.S. 388, 79 L. Ed. 446 (1935); A.L.A. *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 79 L. Ed. 1570 (1935). * * *"

As a result of the foregoing decisions the states which have desired to provide for the determination of terms and conditions of employment by governmental agency where impasses in collective bargaining have threatened strike on public utilities, have established what in effect are administrative agencies subject to judicial review and governed by specific standards, such as the particular labor market both in terms of geography and industry to which they are to make comparisons in fixing terms and conditions and how far, if at all, they may depart from prevailing standards in that market. For a careful analysis of these statutes see Herbert R. Northrup and Richard L. Rowan, Arbitration and Collective Bargaining: An Analysis of State Experience, 14 Lab. Law Journ. 178, 187-188 (February 1963).

In Public Law 88-108, as construed by the courts below, Congress adopted "arbitration," not "administrative regulation" as the method of fixing wages. Congress made no requirement that the Arbitration Board make any findings of fact. The Arbitration Board in fact made none. The opinion of the three neutral members, while it disclosed the process of reasoning of these members, was not concurred in by a majority of the seven-man board. The adoption of the system of lists of firemen to be submitted by the

carrier and then cancelled out as to 10 percent by the union was not defended as a rational resolution of the firemen job issue. Rather it was a gimmick solution typical of arbitrators and indefensible by an administrative agency.

The decisions below are predicated on their holding that Congress intended the Arbitration Board to function as arbitrators function. The Arbitration Board so read their mandate (JA 32, 46) and did so function. The courts below in upholding the award even accorded the Arbitration Board a scope not afforded to arbitrators. They held that Congress did not intend the Arbitration Board to be bound even by such agreements as the parties had reached (JA 381-382, 385; Appendix C, *infra*). Thus, we here have not only arbitration without consent, but even as to the areas where the parties had agreed on terms, the arbitrators were free to disregard those agreements!

For more than eighty years operating employees on railroads have been protected by seniority contracts and by contracts specifying crew consist.[6] The courts have held that such contracts gave railroad employees, without regard to the number of their years of seniority, property rights in their jobs which would be protected by the courts.[7] Also, the right to bargain

[6] Ripley, William Z., Railway Wage Schedules and Agreements, in Report of the Eight-Hour Commission, December 29, 1917, pp. 270, 303, 307-16 352-353 (Gov't Pr. Off. 1918).

[7] *Evans* v. *Louisville & N.R. Co.*, 191 Ga. 395, 402, 12 S.E. 2d 611, 615 (1940); *McGee* v. *St. Joseph Belt Ry. Co.*, 232 Mo. App. 639, 110 S.W. 2d 389, 392 (1937); *Grand Lodge* v. *Mills*, 43 Ariz. 379, 401, 31 P. 2d 971, 980 (1934); *Washington Local Lodge No. 104* v. *Boilermakers*, 33 Wash. 2d 1, 67-68, 70, 203 P. 2d 1019, 1058-1059 (1949); *Fine* v. *Pratt*, 150 S.W. 2d 308, 312 (Tex. Cir. App., 1941); *Ledford* v. *Chicago M St. P. & P.R.R. Co.*, 18 N.E. 2d 568, 572-574, 298 Ill. App. 298, 312 (1939).

collectively and to support bargaining efforts by the right to strike are constitutionally protected rights which are destroyed by Public Law 88-108.

This Court in *Wilko* v. *Swan*, 346 U.S. 427, 435-436 (1953) had occasion to reject arbitration, even when agreed upon by the parties, because this Court regarded the extra-legal features of arbitration as unsuitable to the protection of the interests there at stake. This Court adverted to the arbitrators acting "without judicial instruction in the law;" "their award may be made without explanation of their reasons;" "the arbitrators' conception of the legal meaning of * * * statutory requirements * * * cannot be examined. Power to vacate the award is limited" (346 U.S. at 436). All of these defects and more too inhere in use of the arbitration process as a means of writing contracts governing terms and conditions of employment without the consent of the parties.

The fixing of terms and conditions of employment is a legislative process. Over the years Congress has been permitted to delegate the legislative power vested in it by Article I of the Constitution only where it established administrative agencies, set standards for the exercise of the delegated power, required findings of fact and other procedures which would enable courts to judge if the agency had observed the standards prescribed, and made the findings and awards subject to the usual judicial review, including the substantiality of the evidence. All of these constitutional requirements according to the courts below were ignored by Congress when it enacted Public Law 88-108.

Delegation without standards either makes judicial review impossible or imposes on the judiciary the leg-

islative task of creating standards. Even those who favor a relaxation of the requirement of standards, recognize that such delegation must be accompanied by a judicial review of the substantiality of the evidence to support the order. Kenneth Culp Davis, Administrative Law Treatise (1958), vol. 1, sec. 2.05, pp. 98-99; vol. 4, secs. 29.08-29.09, pp. 154-155, 164-170. *Cf. St. Joseph Stockyards Co.* v. *United States,* 298 U.S. 38, 51-52 (1936); Louis L. Jaffe, Judicial Review: Questions of Fact, 69 Harv. L. Rev. 1020, 1050 (1956). Public Law 88-108, as construed by the courts below, did not provide this standard of judicial review (JA 378, 383, Appendix C, *infra*).

4. This Case Presents Important Issues of Statutory Construction Which Admit of Decision Contrary to the Decisions Below so as to Avoid the Constitutional Issues Presented

Our discussion of point 3, above, has been based on P.L. 88-108 as construed by the district court, which construction the court of appeals adopted. This is a construction under which the arbitration board was not required to make, and did not make, any specific findings concurred in by a majority of the board, even what was called in the statute "finds" was left to the uncontrolled discretion of the board, the scope of judicial review was "extremely limited" (to the area provided for voluntary arbitrations), the award was not subject to review for substantiality of evidence, and even the explicit direction to incorporate into the award matters of agreement between the parties was construed to mean only that the board was "to consider and refer in its decision to any matters as to which it finds the parties were in agreement."

The 4th, 5th, 6th and 7th of the Questions Presented, *supra*, as well as Count I of the petition in

the district court, urge that a different construction of the statute be adopted, that the award be impeached accordingly, and that the constitutional issues be not reached. The grounds on which impeachment is sought, although brought within the provisions of Section 9 of the Railway Labor Act (Appendix E, *infra*) that "the award does not conform, nor confine itself, to the stipulations of "the governing statute(all involve construction of that statute, unlike proceedings for impeachment of an award pursuant to voluntary arbitration. This court should not, by confining its review to the jurisdictional and constitutional issues, deprive itself of the opportunity to avoid constitutional issues by construing a statute so as to be constitutional.

In the concuring and dissenting opinion of Judge Wright in the court below (Appendix A, *infra*) there is raised in another connection the suggestion that the issues going to impeachment are placed beyond this Court's review jurisdiction by the provision in Section 9, Sixth of the Railway Labor Act that the court of appeals decision "upon said questions shall be final." Further examination completely dispels any force of such a suggestion.

An analysis of the legislative history of 28 U.S.C. 1254 (1) shows that Congress intended to confer on this Court the power to review by certiorari, judgments of the courts of appeals issued under Section 9 of the Railway Labor Act despite the provision referred to by Judge Wright. Section 9 of the Railway Labor Act in its present form was enacted on May 20, 1926 (44 Stat. 585). Section 13 of the Railway Labor Act as enacted in 1926 expressly amended the Judicial

Code to include cases in a circuit court of appeals under Section 9 of the Railway Labor Act among the cases to which the certiorari provisions of Sections 239 and 240 of the Judicial Code should apply (Appendix F, *infra*). The 1934 amendments to the Railway Labor Act made no change either in Section 9 or Section 13 (48 Stat. 1197). The 1940 amendments to the Judicial Code, resulted in an express listing in 28 U.S.C. 348 (Appendix G, *infra*) of Section 9 of the Railway Labor Act as among the sections under which cases in the circuit courts of appeals were reviewable by the certiorari procedures of Section 346 and Section 347 of the Judicial Code. In 1948, the Judicial Code was again amended into its present form. 28 U.S.C. 1252, 1253, 1254 (Appendix G, *infra*). While the listing of specific sections was dropped, the legislative history establishes that existing law was preserved so as to retain the power of unrestricted review of cases certified or brought up on certiorari. The report of the Committee on the Judiciary of the House of Representatives on the bill which amended the Judicial Code stated that Section 348 was omitted because the "Section is superfluous as Section 1254 of this revision which was derived from Section 346 and Section 347 of Title 28 U.S.C., 1940 ed., referred to in this section, applies to any case in the circuit court of appeals." H. Rept. No. 308, 80th Cong., 1st Sess., on H.R. 3214, p. A236. Hence nothing in Section 9 restricts the power of this Court to review by certiorari all issues in this case.[8]

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[8] We have set forth in Appendix F, *infra*, Section 13 of the original Railway Labor Act, and in Appendix G, *infra*, the pertinent legislative history of 28 U.S.C. 1252.

CONCLUSION

For the foregoing reasons it is respectfully urged that this Court should issue a writ of certiorari to review the decision below.

Respectfully submitted,

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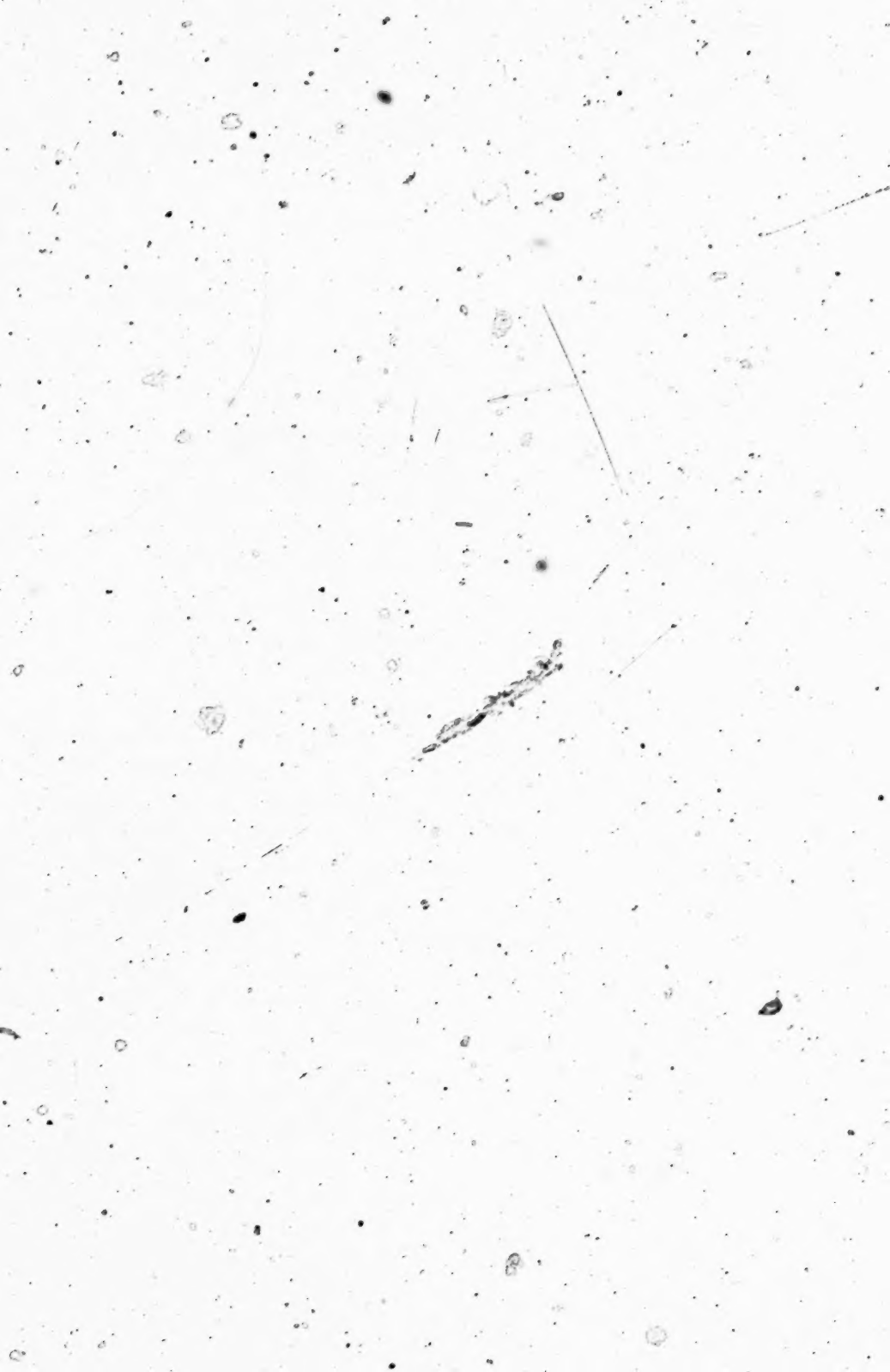
March 20, 1964



APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

PER CURIAM: In the summer of 1963, the appellant unions and the appellee railroads had reached an impasse in their negotiations concerning proposed changes in working conditions, including the question whether firemen should be required on diesel-powered locomotives in freight and yard service. In order to avoid a nation-wide strike which was threatened in consequence, Congress adopted a Joint Resolution,[1] approved August 28, 1963, creating an arbitration board to decide what disposition should be made of the issues about which the parties were unable to agree. The Board's award, said Congress, "shall be binding on both the carrier and organization parties to the disputes and shall constitute a complete and final disposition of the aforesaid issues . . ."

After lengthy hearings, the Board made an award on November 26, 1963, with which the unions were dissatisfied. They filed these suits to impeach the award, as permitted by Section 9 of the Railway Labor Act, 45 U.S.C. § 159, which was made applicable by the Joint Resolution; they also attacked the Resolution as unconstitutional and asked preliminary injunctions against the enforcement of the award. The appellants in Nos. 18,331 and 18,332 filed a motion that a statutory three-judge court be constituted, in which the appellants in Nos. 18,333 and 18,334 did not join. The District Court denied the motion for a three-judge court, and disposed of cross-motions for summary judgment by granting that of the defendants, denying that of the plaintiffs, and dismissing the complaints. The unions appeal.

Error is charged in the denial of the motion for a three-judge court. The Brotherhood of Locomotive Firemen

[1] Public Law 88-108, 77 Stat. 129.

necessarily based the motion on its allegation that the Joint Resolution is unconstitutional and on its prayer that

> "Said defendants and said other carriers and persons be preliminarily enjoined and restrained from putting said award in effect until a hearing is had and a determination made by the Court of the right of the plaintiffs to a permanent injunction."

It is well understood that a plaintiff is not entitled to a three-judge court merely because he prays for an injunction against the enforcement of a statute he claims is unconstitutional. There must at least be an allegation that enforcement is threatened and therefore imminent. In this case there was no such allegation; in fact, we were told the parties have stipulated that nothing would be done to effectuate the award before the termination of this litigation. There must also be substantial grounds for the charge that the statute is unconstitutional. In this case, there was none, as the District Court's opinion pointed out.

We have given meticulous consideration to the parties' voluminous briefs and extensive oral arguments, and have concluded that the opinion of District Judge Holtzoff is a correct and adequate disposition of the issues presented. On the basis of his opinion, 225 F. Supp. 11 (1964), we affirm his judgment.

It is so ordered.

WRIGHT, *Circuit Judge, concurring in part and dissenting in part*. I agree with my colleagues that the award was in accordance with the governing statute, Public Law 88-108, 88th Cong., 1st Sess., 77 Stat. 129. The objections to the Board's actions which are here raised concern matters within its special competence.

However, I would reverse and remand so that a District Court of three judges may consider the constitutionality

of the statute. It seems clear to me that the constitutional issues raised are substantial, and that, unless an injunction issues, the statutory scheme will continue in force prohibiting the unions from striking. P.L. 88-108, § 1. Thus a three-judge court is required. 28 U.S.C. § 2282.

The issue of constitutionality raised in these suits cannot be decided within the special review provided by the governing statute. That statute, 44 Stat. 585, 45 U.S.C. § 159, in providing for review by the District Court and this court of the Board's award, states:

> "Third. Such petition for the impeachment or contesting of any award so filed shall be entertained by the court only on one or more of the following grounds:
>
> "(a) That the award plainly does not conform to the substantive requirements laid down by this chapter for such awards, or that the proceedings were not substantially in conformity with this chapter;
>
> "(b) That the award does not conform, nor confine itself, to the stipulations of the agreement to arbitrate; or
>
> "(c) That a member of the board of arbitration rendering the award was guilty of fraud or corruption; or that a party to the arbitration practiced fraud or corruption which fraud or corruption affected the result of the arbitration: * * *"

Neither unconstitutionality nor nonconformity with the laws of the land is listed as a ground for impeachment. Consequently, the statute prohibits consideration of constitutional issues in the special proceedings under it. Thus this statute differs from special review statutes which authorize consideration of whether an action is "in accordance with law" (*e.g.*, Revenue Act of 1936, ch. 690, § 906 (g), 49 Stat. 1750; Agricultural Adjustment Act, 52 Stat.

63, 7 U.S.C. § 1366). Under such statutes, constitutional issues may be raised and decided. See *Anniston Mfg. Co.* v. *Davis*, 301 U.S. 337, 345 (1937); *Lee* v. *Roseberry*, E.D. Ky., 94 F.Supp. 324, 327 (1950) (three-judge court). Accord, *Oklahoma* v. *Civil Service Comm'n*, 330 U.S. 127, 139 (1947); *Flemming* v. *Nestor*, 363 U.S. 603, 607 (1960). *Cf. Eastern States Petroleum Corporation* v. *Rogers*, 108 U.S. App. D.C. 63, 280 F.2d 611, *cert. denied*, 364 U.S. 891 (1960). No such authorizing phrase is contained in the statute here. 45 U.S.C. § 159, Third.

Moreover, the statute here apparently forecloses review by the Supreme Court in providing that "The determination of said court of appeal[s] upon said questions shall be final." 44 Stat. 586, 45 U.S.C. § 159, Sixth. This provision raises the presumption that Congress did not intend constitutional issues to be considered within such a proceeding, for the intention to prohibit Supreme Court review of constitutional questions should not lightly be imputed to legislators sworn to uphold the Constitution. Compare *Eastern States Petroleum Corporation* v. *Rogers*, *supra*, 108 U.S. App. D.C. at 66, 280 F.2d at 614, and cases there cited.

I conclude, therefore, that a three-judge court should have been empaneled to hear and decide the constitutional issues raised by plaintiffs.

APPENDIX B

Judgment

These cases came on to be heard on the record on appeals from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the orders and judgment of the District Court appealed from in these cases are hereby affirmed.

It is FURTHER ORDERED by the court that a certified copy of the judgment of this Court shall be issued FORTHWITH to the District Court.

Per Curiam.

Dated: February 20, 1964.

Circuit Judge Wright concurs in part and dissents in part.

APPENDIX C

(Filed January 8, 1964)

Civil No. 2921-63

Opinion

* * * * * * * * * *

These two actions are brought to impeach and set aside an award of a special arbitration board created under an act of Congress approved August 28, 1963, Public Law 88-108, 77 Stat. 129, in order to avoid a threatened nation-wide railroad strike, which was then imminent. The function of the board was to arbitrate and make an award concerning two basic issues that were in controversy between the railroads and their staffs. The plaintiffs in these two actions are four organizations or brotherhoods composed of operating railroad employees. They are dissatisfied with the decision and seek to set it aside. Most of the defendants are railroads, all of which have accepted and acquiesced in the award. The remaining defendants are the chairman of the arbitration board and the Attorney General. The United States has intervened as an additional party defendant. As judicial review in this case must be limited to the administrative record and the Court is restricted to passing only on questions of law, the matter has been presented by cross motions for summary judgment.

The present dispute comprehends practically all the Class I railroads in the United States and their operating employees. It arises out of drastic and radical technological changes that have taken place in the transportation industry. Specifically, it is caused by the revolutionary advance consisting of the abandonment of steam power on railroads and the substitution of diesel engines. Principally, what is involved is the status of firemen on railroad locomotives. As their name indicates, their primary function on steam locomotives was to stoke the furnace and keep the fires burning underneath the boilers. They also performed another duty, namely, watching the road and the signals from the left side of the cab, as the engineer sat on the opposite side and made his observations from the right hand window. With the abandonment of steam power and the introduction of diesel engines, there were no longer any fires to keep burning or any furnaces to stoke. The question arose, "What is to become of the fireman?" There is no dispute that they were still necessary on passenger trains in order to perform their secondary function and their status in passenger traffic is not involved in the present controversy. The railroads claimed, however, that they were no longer needed on freight trains, because the duty of watching the road from the left side could be performed by other employees. The railroad brotherhoods, on the other hand, took the position that because they rendered this vital service, firemen should be continued on freight trains. This controversy also comprehended engines operated in yard service. Approximately 30,000 employees were involved. Both sides agreed that as a matter of social justice and enlightened fairness to the men, especially those whose career had been lengthy, there should be no immediate large scale discharge of employees; that some degree of security be granted to them; and that the abolition of the jobs should be accomplished by some gradual process of attrition. Manifestly, the railroads felt a sense of moral responsi-

bility to the veteran workers. Nevertheless, it is quite evident that they also thought that there should be a reasonable limit to their generosity. The extent of the security and the groups of men to whom it should be extended, were in sharp dispute.

A second question in controversy was the composition of train crews. The railroads contended that as a result of modern improvements and innovations the size of many train crews could be substantially reduced. In addition, there were many other problems that divided the contending parties, that were of lesser magnitude and importance and are not involved in these actions.

In order to understand clearly the special legislation creating the arbitration board, it is desirable to recapitulate briefly the salient events that preceded its enactment. The status of firemen on freight trains and yard service had been disputed and discussed from the beginning of the shift from steam to diesel power. The controversy was brought to a head on November 2, 1959, when the carriers issued notices proposing the elimination of firemen in freight and yard service. As has already been stated, there was no desire or intention to do away with them on passenger trains. These notices also proposed the abrogation of regulations fixing the size of train crews. On September 7, 1960, the employees' organizations in turn served a series of notices containing counter-proposals, which, among other things, would have continued and even extended the use of firemen and would have required not less than one conductor and two trainmen in all train crews plus such additional persons as were required to assure maximum safety.

In an endeavor to adjust the differences between the parties and to settle the controversy, the President of the United States, in November, 1960, created a special commission, known as the Presidential Railroad Commission.

This body, after a prolonged investigation and protracted and thorough study, submitted a report on February 26, 1962, containing a series of recommendations. The carrier members of the Commission accepted it although expressing some dissatisfaction. The members representing the employees dissented and rejected most of the proposals.

There followed a series of unsuccessful negotiations pursuant to the Railway Labor Act, in the hope of arriving at a peaceful and amicable settlement of the dispute. In a further effort to avert the strike, which might have resulted in an economic disaster, the President, on April 3, 1963, appointed an Emergency Board known as Emergency Board No. 154. On May 13, 1963, this board submitted a report making recommendations for an adjustment of the issues. The employees' organizations proved unwilling to accept them. Strenuous negotiations were resumed, in which the Secretary of Labor took an active part. On August 2, he submitted a memorandum, accompanied by a series of documents, enumerating and defining the various issues in controversy and endeavoring to indicate areas in which, in his judgment, there was the largest possibility of agreement. A suggested plan for a voluntary arbitration followed, but proved abortive. A strike was imminent. The country was confronted with a serious emergency. A nation-wide railroad strike would have been a calamity. Congress alone could avert the catastrophe. The national legislature was not found wanting. It expeditiously fashioned and invoked a drastic measure. As was said by Chief Justice Hughes in *Home Building & Loan Association* v. *Blaisdell*, 290 U.S. 398, 426, "While emergency does not create power; emergency may furnish the occasion for the exercise of power." It promptly passed a Joint Resolution, which was approved

by the President on August 28, 1963, Public Law 88-108, 77 Stat. 129.[1]

This enactment expressly prohibited any strike (Section 1). It authorized the creation of an arbitration board to consist of seven members, two to be designated by each of the contending groups and three additional members to be selected by the other four. If the four failed to agree on the three neutral members, the latter were to be appointed by the President, and this is what happened. The President named the three neutral members, one of whom was elected chairman (Section 2).

The board was directed to pass on two issues: the use of firemen on other than steam-powered locomotives; and the size and composition of train crews (Section 3). Thus, Congress, in effect, ordered a compulsory arbitration of these two basic differences. It provided that the arbitration should be conducted pursuant to Sections 7, 8, and 9 of the Railway Labor Act, 45 U.S. Code, Sections 157-159 (Section 4). The board was directed to conclude its labors within ninety days (Section 5). Its award was to be deposited in this Court and was to be binding on the parties (Section 4). It was not to become effective until sixty days after filing (Section 5).

In connection with the proceedings, Congress directed the Secretary of Labor to furnish to the board and the parties, copies of his statement of August 2, 1963, to which reference has already been made, and the accompanying papers. The board was required to incorporate in its decision any matters on which it "finds" the parties were in agreement, to resolve the matters on which they were not in agreement and to give due consideration to those matters as to which they were in tentative agreement (Section 3). Section 7a of the statute set forth the standards

[1] The text of this Joint Resolution, without, however, including its recitals is also found in 1963 Pocket Part to 45 U.S.C.A. under Section 157.

and the criteria by which the board was to be governed. It was to give due consideration to the effect of the proposed award upon adequate and safe transportation service to the public and upon the interests of the carrier and employees affected, giving due consideration to the narrowing of the areas of disagreement which had been accomplished in bargaining and mediation.

The board promptly organized and held a continuous series of hearings, at which testimony of numerous witnesses was heard and a large number of exhibits were introduced in evidence. Its award was filed on November 26, 1963. By the terms of the statute it becomes effective on January 25, 1964.

The award contains detailed provisions. It is accompanied by a comprehensive, and well-reasoned opinion of the neutral members, which also includes findings of fact. The decision distinguishes between the question as to what positions should be eliminated or abolished and the question as to how and when such abolition should take place and to what extent the status of the present incumbents should be protected. The board reached the conclusion that firemen, although no longer performing their basic and original function, do, in fact, render necessary services, namely, watching the road and the signals from the left side of the cab. It further held, however, that firemen were not indispensable for this purpose, because on freight trains, unlike passenger trains, there were three men in the cab instead of two, the third being the head brakeman and that the head brakeman could fulfill this task. It is true that firemen also made necessary mechanical adjustments when needed, but the board determined that this work could be done by the engineer or by maintenance groups at terminals. As to the yard service, the board decided that a second man in the cab was unnecessary, since other employees standing on the ground or walking along the track gave necessary guidance to the

engineer. The ultimate conclusion reached, therefore, was that firemen were no longer needed in freight or yard service and that these positions could be eliminated, with the limitation as to yard service that the engine must be equipped with an automatic control. The board further found that there were exceptional situations in which the services of a fireman might be necessary. Accordingly, it ordered that ten per cent of the firemen in freight and yard service be retained, and prescribed a method for ascertaining and determining the employees to be included in that group.

The board prescribed liberal protection for existing employees. It preserved security of tenure for a great many of the firemen regularly in the employ of the railroads at the time when the award becomes effective even though their services could well be dispensed with. Accordingly, all firemen hired more than two years prior to the effective date of the award and in active service at that time were to retain their rights to employment and seniority until death, retirement, resignation or discharge for cause, with the qualification that those firemen who had a seniority of only two to ten years might be offered other comparable positions for which they were or could become qualified. The offer of another job was to carry with it the payment of any relocation expenses. Firemen hired within two years prior to the effective date of the award were not to be entitled to retain their employment or seniority rights, but if their services were terminated, they were to receive a lump sum separation allowance, amounting to six months' pay for those with two full years of service; three months' pay for those whose length of service was between one and two years, and for those with less than one year's service, five days' pay for each month of service. Part-time and furloughed employees, that is, those whose earnings had not exceeded $200 during the two years immediately preceding the effective date of the award, were to be paid if separated from the service,

a severance allowance equal to their earnings during the preceding two years. They might, however, elect to remain on the seniority list with rights to such work as might become available to them. Whenever a job became vacant in such manner that it could not be filled without hiring a new employee, it might be abolished, but not otherwise.

To summarize, even though the board found these positions to be unnecessary, except as to a small fraction of about ten per cent, they were to be abolished only gradually by attrition caused by death, resignation, retirement, or discharge for cause. This process might consume many years, although perhaps it was likely to become accelerated with the passage of time. Thus all firemen in active service for more than two years were guaranteed a permanent continuation of their existing status until death, retirement, resignation or discharge for cause.

The second issue determined by the board was the size and composition of train crews. The award directed that no change be made in any stipulated number of members of train crews, except pursuant to its provisions or by agreement. It was further provided that where two or more trainmen were required at that time, any party in interest might give notice of a proposed change in the composition of the train crew. If no agreement was then reached, the issue could be referred by either party to a special board of adjustment to be created in the manner prescribed by the award. A series of specific and concrete principles or "guidelines" to be followed by these special tribunals in arriving at their decisions, were formulated and set forth. In view of the fact that possibly thousands of minor controversial situations might arise from time to time in different parts of the country, each depending in large part on local and possibly temporary conditions, it was obviously impracticable for the board to enunciate any rigid and inflexible formula as to the composition of all train crews throughout the United States or to decide

every one of the numerous individual cases. It manifestly was impossible to do so within the time at its disposal, since the statute required the board to make a final report within ninety days. The award enunciated, however, a definite practicable method to solve these multitudinous problems as they arose. Trainmen and similar employees, other than those on furlough at the time of the effective date of the award, were to retain their rights to service assignments to the extent of available positions.

The neutral members of the board were unanimous in their decision. The representatives of the carriers concurred, but nevertheless, filed a memorandum expressing the view that the award was much more liberal to the employees than it should have been. The employees' representatives filed strong dissenting statements. Their position seems to be that the award was not sufficiently liberal to the employees. Specifically, their grievance is that certain categories of employees are excluded from the benefits of permanency of seniority; principally, those in the furloughed group. Moreover, they objected to the privilege accorded to the carriers to offer comparable jobs to employees of less than ten years seniority.

Since the merits of the decision are obviously not subject to judicial review, the present actions are predicated on two contentions: first that the award does not conform to the requirements of the statute; and second, that the statute is unconstitutional.

The scope of judicial review in this case is exceedingly limited and narrow. Section 4 of the enabling Act provides that the award shall be subject to Section 9 of the Railway Labor Act, 45 U.S. Code 159. Paragraph Second of the last-mentioned section permits an action to be maintained to impeach an arbitration award. Paragraph Third prescribes the following range of judicial review:

"Third. Such petition for the impeachment or contesting of any award so filed shall be entertained by the court only on one or more of the following grounds:

(a) That the award plainly does not conform to the substantive requirements laid down by this chapter for such awards, or that the proceedings were not substantially in conformity with this chapter;

(b) That the award does not conform, nor confine itself, to the stipulations of the agreement to arbitrate. . . ."

Another paragraph permits the court to impeach an award on the ground of fraud or corruption, but this provision is not relevant here. Thus, this court may consider only whether the award conforms to the requirements of law or to the stipulations of the agreement to arbitrate. In this instance, the enabling Act supplants an agreement to arbitrate.

The court may not review the question whether there is substantial evidence to sustain the findings of fact. It follows hence that the scope of review in this instance is much narrower than that which generally prevails in connection with administrative decisions. Counsel for the plaintiff in the second of these actions argued that the question whether substantial evidence sustained the findings was open in this court on the ground that the Administrative Procedure Act was applicable. Counsel for the plaintiff in the first action affirmatively declined to join in this position. He was well advised in taking this attitude, because the contention is manifestly untenable. The Administrative Procedure Act expressly excepts from its coverage those agencies that are composed of representatives of the parties to disputes determined by them. 5 U.S. Code, 1001. Obviously, this provision includes agencies composed even partially of representatives of the parties, as is the case here.

Moreover, the Railway Labor Act is a specific statute directed and limited to proceedings of a special type. The Administrative Procedure Act is general legislation. It is well settled that a specific statute will not ordinarily be deemed superseded, amended or repealed by a later enactment of a general character. *Baloca Watch Company* v. *United States*, 365 U.S. 753, 758.

Even if, however, the court were authorized to consider the question whether the findings are sustained by substantial evidence, such a doctrine would not avail the plaintiffs. Counsel have not sufficiently shown that any specific finding of the board is not supported by substantial evidence. At most, they have argued that controverted evidence might have warranted a different conclusion. The well-reasoned opinion of the board convincingly shows that the board thoroughly weighed the evidence and that there was a rational basis for its conclusions.

Even under the broader doctrine as to judicial review of administrative decisions, the court may not go beyond this point. There was nothing arbitrary or capricious about the decision. *Mississippi Valley Barge Line Co.* v. *United States*, 292 U.S. 282, 286-7.

The board displayed extreme consideration and even benevolence for the future of employees in regular service. Many of the employees may remain at their posts for years to come. No ruthless wholesale discharges were contemplated. The carriers are not objecting to incurring this expense, apparently accepting it in a far-sighted manner as the price that they must pay for eventual permanent elimination of firemen from freight and yard service. Society is helped by not being confronted with a large sudden addition to the ranks of the unemployed, which might have had an adverse effect on the national economy, might have unduly burdened unemployment insurance rolls and possibly created an additional load on relief and welfare funds. Regular permanent employees have no

just grievance. They are protected for the period of their working life. Short-term employees as well as those who have been in a furloughed status for a long time hardly have any moral rights or equities at the hands of railroads.

A large part of the lengthy written and oral arguments on the part of plaintiffs' counsel was directed to the merits of the award. They claim, as has been previously stated, that it was not sufficiently liberal to the employees. Obviously, such matters may not be considered by the court.

The basic argument as to the law was a contention that the award should be deemed invalid on the ground that it departed from the limitations of the statute. This contention was predicated on the direction in Section 3 of the enabling Act that "the arbitration board shall incorporate in such decision any matters on which it *finds*[2] the parties were in agreement, shall resolve the matters on which the parties were not in agreement, and shall . . . give due consideration to those matters on which the parties were in tentative agreement." Plaintiffs' counsel would construe the first clause of this sentence as a mandate to the board to accept and give effect to whatever agreements had been reached during the negotiations and as a restriction of its jurisdiction only to those points as to which there was no accord. While the statute is not as clear as it might be, the court is of the opinion that plaintiffs' counsel have misconceived its meaning. Congress did not say and manifestly did not intend what plaintiffs' counsel would read into the Act. The statutory instruction should be interpreted as directing the board to consider and refer in its decision to any matters as to which it finds the parties were in agreement. It does not command the board to adopt such agreements. There was no intention on the part of the Congress to circumscribe the board in this manner. Obviously, the purpose of the

[2] Emphasis supplied.

clause was to point the attention of the board to any agreements reached in order that the board might give them due weight, but not to limit its discretion in arriving at a final decision.

Any indefiniteness or ambiguity in the phraseology of this clause is resolved by the Committee reports. See Senate report No. 459 dated August 23, 1963 (U.S. Congressional and Administrative News, September 20, 1963, pp. 1399, 1406). In discussing Section 3, the Senate Committee on Commerce states: "The board in reaching its decision would consider areas in which the two parties were in agreement, those areas in which there was tentative agreement, and those areas where no agreement existed." It is clear, therefore, that all that the board was required to do was to consider these matters without being bound by them.

Any other construction would seem unreasonable. In the course of prolonged negotiations, an accord may be reached on some points. Ordinarily, however, parties do not consider such fragmentary stipulations binding unless a final agreement is concluded as to all matters in controversy. Conceivably, one or more of many subjects disputed in the course of protracted discussions may be separately resolved, but if there is no final understanding, the parties may not consider themselves bound by the partial steps.

Actually, the board in its opinion analyzed all of the negotiations between the parties, indicated matters on which there had been agreement and those as to which the parties were deadlocked. Its opinion is replete with such references. For example, it indicates that there was a complete disagreement as to the proposed elimination of firemen's jobs; that there was a common recognition of the fact that where a job has been found unnecessary, the equities of the fireman working on the job should affect the method and time of its elimination; but that there was

no agreement as to the details of working out these equities. (See page 20 of Opinion of Board.)

There is still a further fallacy in counsel's argument. No definite agreement is to be clearly found in any single document or series of documents. On what points the parties were in agreement or in disagreement or in tentative agreement can be ascertained only by a laborious comparison and detailed analysis of numerous letters, memoranda and statements, many of which are ambiguous. In fact, there were disputes between the parties as to the points on which they had arrived at an accord. The board, in effect, had to make findings from disputed evidence as to what matters had been agreed upon. Obviously, the Congress must have had this thought in mind because the statutory provision refers to matters on which the board "finds" the parties were in agreement. In other words, the board had to undertake a fact-finding process in order to make the determination what agreements had been reached. Manifestly, such findings are not subject to review.

Even if, however, the interpretation that plaintiffs' counsel would attach to the statutory provision were to prevail, it would avail them nought. The have not clearly or convincingly demonstrated that any finding of the board was erroneous. There are involved matters of inference and deduction from numerous documents and statements, many of which were far from definitive. The court concludes, therefore, that the objection that the board has failed to comply with its charter in this respect is not well founded.

Counsel for the plaintiffs further urge that the board failed to comply with the requirement of Section 3, that the award should constitute a complete and final disposition of the issues covered by its decision. They point to the fact that the board provided that numerous individual disputes concerning the sizes of train crews should be re-

ferred from time to time to local boards and they argue that such a provision constituted a failure on the part of the board to make a complete and final disposition of the issues. This contention is entirely lacking in merit. What the board did was to bar any changes for the time being and to prescribe a definite formula and a group of concrete principles to govern the determination of numerous disputes that were bound to arise in the future as to the composition of train crews on individual trains. Conceivably, there could be thousands of such disputes from time to time. It then constructed machinery for the disposition of these matters. These provisions must be deemed in essence to constitute a complete and final disposition of the issues. The situation is analogous to that of an interlocutory judgment determining issues framed by the pleadings or by a pre-trial order, followed by a reference to a special master to state an account or assess damages on the basis prescribed by the court.

It is an elementary principle of statutory construction that every statute must receive a sensible and reasonable construction. *United States* v. *American Trucking Associations*, 310 U.S. 534, 542. *Holy Trinity Church* v. *United States*, 143 U.S. 457, 459.

It would be highly unreasonable to construe this statute as requiring the board itself to fix permanently the number of members of the crew on each of many thousands of trains in the United States. To perform this task at one central point would not be feasible and even if it were at all practicable it would consume many months and maybe years. The board complied with the spirit of the statute by providing, first, that there should be no change for the time being in the composition of any train crew, by prescribing specific formulae and principles for guidance in the determination of any requested modifications; and creating a decentralized local machinery for adjudicating disputes as to any proposed change. This decision

must be deemed a final disposition and solution of this problem.

It is then urged in behalf of the plaintiffs that the arbitration board lacked authority to require the parties to bear the expenses of neutral members of the local adjustment boards. Counsel called attention to the fact that the parties in their negotiations had agreed that such expenses should be assumed by the Government. As heretofore stated, however, the board was not bound by agreements made by the parties. Moreover, as to this matter, it is very simple for two persons to agree that the Government should bear the expenses of some proceeding. No one is, however, authorized to bind the Government in this manner. Consequently, any such agreement would be a nullity. The arbitration board, was not empowered to impose such a liability on the Government. Congress alone may do so. Consequently, it was entirely proper and reasonable for the board to provide that such expenses should be borne by the parties to the proceedings.

In view of the foregoing considerations, the court reaches the conclusion that the award is valid. It is within the statutory authority of the board and is not subject to any infirmity. There remains for consideration the challenge to the constitutionality of the statute under which the board acted.

At the opening of the oral arguments, counsel for the plaintiffs in civil action No. 2919-63 moved that in view of the fact that a constitutional question was involved, a three-judge court be convened pursuant to 28 U.S.C. 2282. Counsel for the plaintiff in civil action 2921-63 expressly and affirmatively declined to join in the application expressing the view that this provision was not applicable. The defendants opposed the motion. This court denied it on the ground that the action was not for an injunction, but for a decree impeaching and setting aside the award and that the prayer for an injunction was surplusage. It

was the opinion of this court that no action for an injunction would lie. The relief sought was substantially in the nature of a declaratory judgment. The court based its ruling on *Thompson* v. *Whittier*, 365 U.S. 465 reversing 185 F. Supp. 306, 307; *International Ladies' Garment Workers' Union* v. *Donnelly Garment Company*, 304 U.S. 243, 250; and *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 154.

The power of the Government to regulate persons engaged in a public calling or in a calling coupled with a public interest has its roots in the common law. If a business of this type enters interstate commerce, the legislative power is lodged in Congress as a result of authority conferred on it to regulate commerce between the States. Some of these principles were summarized and enunciated by the Supreme Court in the celebrated case of *Munn* v. *Illinois*, 94 U.S. 113, 126, where Mr. Chief Justice Waite wrote as follows:

> "When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created."

It is elementary that railroads, as common carriers for hire, are engaged in a public employment affecting the public interest, and, therefore, are subject to legislative control. *Chicago, Burlington and Quincy Railroad Co.* v. *Iowa*, 94 U.S. 155, 161. In fact, railroads constitute a typical and perhaps the most common type of public calling. With modern industrial and commercial developments there has been a natural tendency to expand the regulatory power of Congress over businesses engaged in interstate commerce. On the one hand new categories of occupations have been brought within its coverage, as for instance the operation of a grain elevator, *Munn* v. *Illinois*, *supra*; and the dairy industry, *Nebbia* v. *New York*, 291

U.S. 502. So, too, it has been extended to additional types of control. Originally, such regulation was directed principally to rates and charges exacted from the public and to services rendered to patrons and consumers. It has been expanded to include such matters as safety requirements, hours of labor and similar subjects. The Supreme Court has gone as far as to sustain a statute regulating minimum wages paid to employees in any business affecting interstate commerce, irrespective of whether it is in the category of a public calling. *United States* v. *Darby*, 312 U.S. 100, 117. The regulatory power extends not only to management but to employees as well. Thus, it was stated in *Wilson* v. *New*, 243 U.S. 332, 364:

> "When one enters into interstate commerce one enters into a service in which the public has an interest and subjects one's self to its behests. And this is no limitation of liberty; it is the consequence of liberty exercised, the obligation of his undertaking, and constrains no more than any contract constrains. The obligation of a contract is the law under which it is made and submission to regulation is the condition which attaches to one who enters into or accepts employment in a business in which the public has an interest."

The decision in *Wilson* v. *New*, *supra*, related to a situation very similar to that presented in the instant case. In March, 1916 the country was confronted with a nation-wide railroad strike, as it was in this instance. It originated in a controversy concerning hours of work and wages of railroad employees. The Congress solved the problem by passing a statute fixing an eight-hour standard work day on all railroads and providing that compensation of their employees should not be reduced below the then standard day's wage, pending an investigation by a Presidential Commission. The constitutionality of this statute was challenged in the same manner as is being done in

the case at bar. The Supreme Court upheld the validity of the Act as within the regulatory power of Congress.

Counsel for the plaintiffs attempt to distinguish the two statutes in that the 1916 Act involved in the *Wilson* case was a legislative decision as to hours and wages, whereas in the Act here involved, the Congress delegated to a board the power to make the determination. It requires no argument, however, to demonstrate that Congress has the authority to delegate its legislative power in this respect to administrative agencies. It has done so in respect to various fields, such as carriers, to the Interstate Commerce Commission; electric power, to the Federal Power Commission; radio and television to the Federal Communications Commission, and the like.

The suggestion was made during the oral arguments that compulsory arbitration was a far reaching innovation. This contention is hardly accurate. The Railway Labor Act, by the creation of the National Railroad Adjustment Board and the powers conferred on it, in fact, provided for compulsory arbitration of minor disputes between carriers and labor organizations as far back as 1926, 45 U.S. Code 153. Countless proceedings of this nature have been conducted under it over the years.

In their reply arguments, counsel for the plaintiffs with commendable candor finally conceded that Congress had the power to enact legislation of the type involved here, and were relegated to the position that the enabling Act was vulnerable solely because it failed to prescribe sufficient and adequate standards to be followed by the agency. The law, however, does not require that the standards and guides be defined with the accuracy and precision of a mathematical formula which can be applied automatically. They need not be an exact yardstick. It is sufficient if Congress indicates a general criterion or an aim to serve as a guide to the administrative agency. The present statute clearly complies with this requirement.

Section 7 prescribes the following standards: "Adequate and safe transportation service to the public"; "interests of the carrier and employees affected"; "due consideration to the narrowing of the areas of disagreement which has been accomplished in bargaining and mediation." Under the authorities about to be discussed these standards are fully adequate to save the statute from a successful challenge on the ground of indefiniteness. In fact, many provisions of a more general character have been upheld by the Supreme Court.

For example, in *Yakus v. United States*, 321 U.S. 414, 423, the Supreme Court, in an opinion by Mr. Chief Justice Stone, sustaining the validity of the Emergency Price Control Act of 1942 held that the following standards complied with the constitutional requirement: that the prices fixed by the Administrator should further the policy and conform to the standards prescribed by the Act; that prices were to effectuate the declared policy of the Act to stabilize commodity prices so as to prevent inflation and its enumerated disruptive causes and effects; that the prices established must be fair and equitable and that in fixing them due consideration should be given to prevailing prices during a designated base period. Obviously, these standards were no more precise or definite than those involved in the instant statute.

In *Opp Cotton Mills, Inc. v. Administrator*, 312 U.S. 126, the Supreme Court, also in an opinion by Mr. Chief Justice Stone, sustained the validity of the Fair Labor Standards Act. It held that the following standards prescribed by the Act were sufficiently definite: the declared policy of the Act to raise minimum wages to forty cents an hour as rapidly as economically feasible without substantially curtailing employment and to determine the highest minimum wage rates with due regard to economic and comparative conditions.

Numerous other examples may be cited. To select but a few illustrative instances, the following standards have been held sufficient and adequate: "public interest, convenience or necessity," *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U.S. 86-90; "public interest," *New York Central Securities Corporation* v. *United States*, 287 U.S. 12, 24; "just and reasonable rates," *Federal Power Commission* v. *Hope Natural Gas Company*, 320 U.S. 591, 600; "excessive profits," *Lichter* v. *United States*, 334 U.S. 742, 775.

The conclusion is inescapable that the standards as defined in the enabling Act are sufficiently adequate and definite. The statute is not vulnerable to any attack on the ground of unlawful delegation of power without proper standards. The statute is clearly constitutional as being within the power of the Congress. In fact, this court should have been justified in denying the motion for the convening of a three-judge court on the ground that no substantial constitutional question is presented, as well as on the procedural ground on which it acted.

In the light of the foregoing discussion, the award made by the arbitration board is valid; the Congress had power to order the arbitration; and, the board acted lawfully within the orbit of the authority delegated to it.

The defendants' motions for summary judgment are granted. The plaintiffs' motions for summary judgment are denied. Counsel will submit an appropriate order.

/s/ ALEXANDER HOLTZOFF
United States District Judge

January 8, 1964.

APPENDIX D

Public Law 88-108, 77 Stat. 129

WHEREAS the labor dispute between the carriers represented by the Eastern, Western, and Southeastern Carriers' Conference Committees and certain of their employees represented by the Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, Order of Railway Conductors and Brakemen, Brotherhood of Railroad Trainmen, and the Switchmen's Union of North America, labor organizations threatens essential transportation services of the Nation; and

WHEREAS it is essential to the national interest, including the national health and defense, that essential transportation services be maintained; and

WHEREAS all the procedures for resolving such dispute provided for in the Railway Labor Act have been exhausted and have not resulted in settlement of the dispute; and

WHEREAS the Congress finds that emergency measures are essential to security and continuity of transportation services by such carriers; and

WHEREAS it is desirable to achieve the above objectives in a manner which preserves and prefers solutions reached through collective bargaining; and

WHEREAS, on August 2, 1963, the Secretary of Labor submitted to the carrier and organization representatives certain suggestions as a basis of negotiation for disposition of the fireman (helper) and crew consist issues in the dispute and thereupon through such negotiations tentative agreement was reached with respect to portions of such suggestions; and

WHEREAS, on August 16, 1963, the carrier parties to the dispute accepted and the organization parties to the dispute accepted with certain reservations the Secretary of Labor's suggestion that the fireman (helper) and crew

consist issues be resolved by binding arbitration but the said parties have been unable to agree upon the terms and procedures of an arbitration agreement: Therefore be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That:

No carrier which served the notices of November 2, 1959, and no labor organization which received such notices or served the labor organization notices of September 6, 1960, shall make any change except by agreement, or pursuant to an arbitration award as hereinafter provided, in rates of pay, rules, or working conditions encompassed by any of such notices, or engage in any strike or lockout over any dispute arising from any of such notices. Any action heretofore taken which would be prohibited by the foregoing sentence shall be forthwith rescinded and the status existing immediately prior to such action restored.

SEC. 2. There is hereby established an arbitration board to consist of seven members. The representatives of the carrier and organization parties to the aforesaid dispute are hereby directed, respectively, within five days after the enactment hereof each to name two persons to serve as members of such arbitration board. The four members thus chosen shall select three additional members. The seven members shall then elect a chairman. If the members chosen by the parties shall fail to name one or more of the additional three members within ten days, such additional members shall be named by the President. If either party fails to name a number or members to the arbitration board within the five days provided, the President shall name such member or members in lieu of such party and shall also name the additional three members necessary to constitute a board of seven members, all within ten days after the date of enactment of this joint resolution. Notwithstanding any other provision of law, the National Mediation Board is authorized and directed: (1) to com-

pensate the arbitrators not named by the parties at a rate not in excess of $100 for each day together with necessary travel and subsistence expenses, and (2) to provide such services and facilities as may be necessary and appropriate in carrying out the purposes of this joint resolution.

Sec. 3. Promptly upon the completion of the naming of the naming of the arbitration board the Secretary of Labor shall furnish to the board and to the parties in dispute copies of his statement to the parties of August 2, 1963, and the papers therewith submitted to the parties, together with memorandums and such other data as the board may request setting forth the matters with respect to which the parties were in tentative agreement and the extent of disagreement with respect to matters on which the parties were not in tentative agreement. The arbitration board shall make a decision, pursuant to the procedures hereinafter set forth, as to what disposition shall be made of those portions of the carriers' notices of November 2, 1959, identified as "Use of Firemen (Helpers) on Other Than Steam Power" and "Consist of Road and Yard Crews" and that portion of the organizations' notices of September 7, 1960, identified as "Minimum Safe Crew Consist" and implementing proposals pertaining thereto. The arbitration board shall incorporate in such decision any matters on which it finds the parties were in agreement, shall resolve the matters on which the parties were not in agreement, and shall, in making its award, give due consideration to those matters on which the parties were in tentative agreement. Such award shall be binding on both the carrier and organization parties to the dispute and shall constitute a complete and final disposition of the aforesaid issues covered by the decision of the board of arbitration.

Sec. 4. To the extent not inconsistent with this joint resolution the arbitration shall be conducted pursuant to sections 7 and 8 of the Railway Labor Act, the board's award shall be made and filed as provided in said sections

and shall be subject to section 9 of said Act. The United States District Court for the District of Columbia is hereby designated as the court in which the award is to be filed, and the arbitration board shall report to the National Mediation Board in the same manner as arbitration boards functioning pursuant to the Railway Labor Act. The award shall continue in force for such period as the arbitration board shall determine in its award, but not to exceed two years from the date the award takes effect, unless the parties agree otherwise.

Sec. 5. The arbitration board shall begin its hearings thirty days after the enactment of this joint resolution or on such earlier date as the parties to the dispute and the board may agree upon and shall make and file its award not later than ninety days after the enactment of this joint resolution: *Provided, however*, That said award shall not become effective until sixty days after the filing of the award.

Sec. 6. The parties to the disputes arising from the aforesaid notices shall immediately resume collective bargaining with respect to all issues raised in the notices of November 2, 1959, and September 7, 1960, not to be disposed of by arbitration under section 3 of this joint resolution and shall exert every reasonable effort to resolve such issues by agreement. The Secretary of Labor and the National Mediation Board are hereby directed to give all reasonable assistance to the parties and to engage in mediatory action directed toward promoting such agreement.

Sec. 7. (a) In making any award under this joint resolution the arbitration board established under section 2 shall give due consideration to the effect of the proposed award upon adequate and safe transportation service to the public and upon the interests of the carrier and employees affected, giving due consideration to the narrowing of the areas of disagreement which has been accomplished in bargaining and mediation.

(b) The obligations imposed by this joint resolution, upon suit by the Attorney General, shall be enforcible through such orders as may be necessary by any court of the United States having jurisdiction of any of the parties.

Sec. 8. This joint resolution shall expire one hundred and eighty days after the date of its enactment, except that it shall remain in effect with respect to the last sentence of section 4 for the period prescribed in that sentence.

Sec. 9. If any provision of this joint resolution or the application thereof is held invalid, the remainder of this joint resolution and the application of such provision to other parties or in other circumstances not held invalid shall not be affected thereby.

Approved August 28, 1963.

APPENDIX E

Railway Labor Act, § 9 First-Seventh (45 U.S.C. §§ '59 First-Seventh)

Sec. 9. First. The award of a board of arbitration, having been acknowledged as herein provided, shall be filed in the clerk's office of the district court designated in the agreement to arbitrate.

Second. An award acknowledged and filed as herein provided shall be conclusive on the parties as to the merits and facts of the controversy submitted to arbitration, and unless, within ten days after the filing of the award, a petition to impeach the award, on the grounds hereinafter set forth, shall be filed in the clerk's office of the court in which the award has been filed, the court shall enter judgment on the award, which judgment shall be final and conclusive on the parties.

Third. Such petition for the impeachment or contesting of any award so filed shall be entertained by the court only on one or more of the following grounds:

(a) That the award plainly does not conform to the substantive requirements laid down by this Act for such awards, or that the proceedings were not substantially in conformity with this Act;

(b) That the award does not conform, nor confine itself, to the stipulations of the agreement to arbitrate; or

(c) That a member of the board of arbitration rendering the award was guilty of fraud or corruption; or that a party to the arbitration practiced fraud or corruption which fraud or corruption affected the result of the arbitration: *Provided, however*, That no court shall entertain any such petition on the ground that an award is invalid for uncertainty; in such case the proper remedy shall be a submission of such award to a reconvened board, or subcommittee thereof, for interpretation, as provided by this Act: *Provided further*, That an award contested as herein provided shall be construed liberally by the court, with a view to favoring its validity, and that no award shall be set aside for trivial irregularity or clerical error, going only to form and not to substance.

Fourth. If the court shall determine that a part of the award is invalid on some ground or grounds designated in this section as a ground of invalidity, but shall determine that a part of the award is valid, the court shall set aside the entire award: *Provided, however*, That, if the parties shall agree thereto, and if such valid and invalid parts are separable, the court shall set aside the invalid part, and order judgment to stand as to the valid part.

Fifth. At the expiration of ten days from the decision of the district court upon the petition filed as aforesaid, final judgment shall be entered in accordance with said decision, unless during said ten days either party shall appeal therefrom to the circuit court of appeals. In such case only such portion of the record shall be transmitted to the appellate court as is necessary to the proper under-

standing and consideration of the questions of law presented by said petition and to be decided.

Sixth. The determination of said circuit court of appeals upon said questions shall be final, and being certified by the clerk thereof to said district court, judgment pursuant thereto shall thereupon be entered by said district court.

Seventh. If the petitioner's contentions are finally sustained, judgment shall be entered setting aside the award in whole or, if the parties so agree, in part; but in such case the parties may agree upon a judgment to be entered disposing of the subject matter of the controversy, which judgment when entered shall have the same force and effect as judgment entered upon an award.

APPENDIX F

Section 13 of the Railway Labor Act as originally enacted (Act of May 20, 1926, 44 Stat. 577, 587) was as follows:

> SEC. 13. (a) Paragraph 'Second' of subdivision (b) of section 128 of the Judicial Code, as amended, is amended to read as follows:
>
> 'Second. To review decisions of the district courts, under section 9 of the Railway Labor Act.''
>
> (b) Section 2 of the Act entitled 'An Act to amend the Judicial Code, and to further define the jurisdiction of the circuit court of appeals and of the Supreme Court, and for other purposes', approved February 13, 1925, is amended to read as follows:
>
> 'SEC. 2. That cases in a circuit court of appeals under section 9 of the Railway Labor Act; under section 5 of 'An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes,' approved September 26, 1914; and under sec-

tion 11 of 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914, are included among the cases to which sections 239 and 240 of the Judicial Code shall apply.'

APPENDIX G

The relevant provisions of the Judiciary Act of 1925 (Act of February 13, 1925, 43 Stat. 936, 938, 939) are as follows:

SEC. 240. (a) In any case, civil or criminal, in a circuit court of appeals or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, . . . to require by certiorari, either before or after a judgment or decree by such lower court that the cause be certified to the Supreme Court for determination by it with the same power and authority and with the effect, as if the cause had been brought there by unrestricted writ of error or appeal.

(b) Any case in a circuit court of appeals where is drawn in question the validity of a statute of any state, on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is against its validity, may, at the election of the party relying on such state statute, be taken to the Supreme Court for review on writ of error or appeal. . . .

. . . . . .

SEC. 2. That cases in a circuit court of appeals under section 8 of 'An Act providing mediation, conciliation, and arbitration in controversies between certain employers and their employees,' approved July

15, 1913; . . . are included among the cases to which sections 239 and 240 of the Judicial Code shall apply.

The relevant provisions of 28 U.S.C. 347, 1940 ed., are identical with those of Section 240, 43 Stat. 938, 939, above, except that in Sectio n347(a) the words "United States Court of Appeals for the District of Columbia" were substituted for the words "Court of Appeals of the District of Columbia" and except that both Section 347(a) and Section 347(b) omitted the words "writ of error or."

The relevant provisions of 28 U.S.C. 348, 1940 ed., are as follows:

SEC. 348

. . . . . .

Cases in a circuit court of appeals under Section 159 of Title 45 . . . are included among the cases to which Sections 346 and 347 of this title shall apply.

The relevant provisions of the Judiciary and Judicial Procedure Act (Act of June 25, 1948, 62 Stat. 869, 928, 984, 992, 1001, which are presently in effect (28 U.S.C. 1254, 2680) are as follows:

§ 1254. Court of appeals, certiorari; appeal, certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a state statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States.

§ 2680. Exceptions.

SEC. 39. The sections or parts thereof of . . . Statutes at Large enumerated in the following schedule are hereby repealed . . .

• • • • • • • • • • •

Schedule of Laws Repealed.

Date	Statutes at Large Chapter	Section	Volume	Page	U. S. Code Title	Section
• •	•	•	•	•	•	•
1926						
May 20	347	13	44	587	28	225,348
• •	•	•	•	•	•	•

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Supreme Court of the United States

October Term, 1963

No. 935

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *et al.*,

Petitioners,

against

CERTAIN CARRIERS, REPRESENTED BY THE EASTERN, WESTERN AND SOUTHEASTERN CARRIERS' CONFERENCE COMMITTEE, etc.,

Respondent.

MOTION AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR CERTIORARI

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Respondents.

MOTION

To the Honorable—

The Judges of the United States Supreme Court:

Comes now the Transport Workers Union of America, AFL-CIO, and respectfully shows this Court:

The Movant

(1) The Transport Workers Union of America, AFL-CIO, is a labor organization within the meaning of the Railway Labor Act and the National Labor Relations Act as amended, with 130,000 members who are employed,

---

[1] In the Court of Appeals this case was heard together with litigation instituted by the Brotherhood of Locomotive Engineers (Ct. App. Nos. 18334). Movant understands that Petition for Certiorari will shortly be filed by the Brotherhood of Locomotive Engineers and it is sought by this motion to have this proposed brief in support of granting certiorari be deemed made with respect to that petition when and if filed.

among other things, on railroads and air lines, engaged in interstate and foreign transport, as well as local bus and rapid transit facilities, some of which are engaged in transport between or among two or more states.

2) The objects of the organization as stated in its International Constitution include (Article II, as follows:)

> "(b) To establish through collective bargaining adequate wage standards and retirement benefits, shorter hours of work and improvements in the conditions of employment for the workers in the industry.
>
> "(c) To promote legislation and to engage in such other activity as may be deemed necessary or advisable properly to safeguard the economic security and social welfare of working people and to protect and extend our democratic institutions, civil rights and liberties, and to perpetuate the cherished traditions of our democracy."

3. On motion duly made in the District Court of Appeals the movant was allowed, over the objection of the carrier-defendants, and on consent of the United States, to file its brief *amicus curiae* in that court, and said brief was filed and considered there.

The Nature of the Movant's Interest

4. The Transport Workers Union and its Railroad Division was not directly affected by the attempted changes in working conditions or working rules which led to the enactment of Public Law 88-108, the statute involved in these appeals. Obviously, however, a Union many of whose members are employed in commerce is directly concerned at the imposition of a solution upon others similarly situated.

5. The basic constitutional question and principle involved in the enactment and application of such a statute

is of direct and vital concern to the members of the Transport Workers Union, both as workingmen and as citizens of a free country. The preservation of collective bargaining in a free and democratic society and the protection of industrial democracy against the threat of corrosion and destruction are of the utmost importance to all the members of T. W. U.

Question of Concern to Movant

6. The applicant is concerned because the question of law of the greatest public importance necessarily presented by this case may be insufficiently stressed or omitted by petitioners, namely—

> whether a statute which provides for a Federal Agency or Commission with power to decree the wages, hours and working conditions of employees, without their consent and against their wishes, is within the competence and the constitutional power of the Congress of the United States?

Such a Commission or Agency has been established by Public Law 88-108, and while it is styled an "Arbitration Board", it is not in any true sense an *arbitration* board but is solely a regulatory and controlling agency as to terms and conditions of employment that does not depend or find source for its authority in the consent of the employees affected or their representatives.

7. The constitutionality of such an agency or commission has never been upheld by any court of the United States prior to the decisions of the courts below. It is of great concern to the Transport Workers Union of America and its members that the precedent implied in this case, granting congressional power to create an agency or commission such as described herein, should not be made by default.

Motion

8. Pursuant to Rule 42(1) of the Rules of this Court, the undersigned attorneys for Transport Workers Union of America, addressed an inquiry to the parties asking for written consent to the filing of a brief as *amicus curiae* herein. A written response was received from the United States Solicitor General, as attorneys for Respondents, et al., in which he consented. Attorneys for Petitioner and for the prospective petitioner in the *Locomotive Engineers'* case also consented. The attorneys for the carriers have declined to consent.

WHEREFORE, the undersigned respectfully prays this Court that the application of the Transport Workers Union of America, AFL-CIO to submit its brief *amicus curiae* in support of the Petition for Certiorari in the form and style submitted herewith, be granted.

March 25, 1964.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1963

No. 935

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *et al.*,

Petitioners,

against

CERTAIN CARRIERS, REPRESENTED BY THE EASTERN, WESTERN AND SOUTHEASTERN CARRIERS' CONFERENCE COMMITTEE, etc.,

Respondents.

PROPOSED BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR CERTIORARI [2]

Statement: The Court of Appeals of the District of Columbia, affirmed (with a dissent by Mr. Circuit Judge Wright on the substantiality of the constitutional question presented) a judgment of the District Court of the District of Columbia, Holtzoff, J., on cross motions for summary judgment in two actions to impeach and set aside an award of a so-styled "Arbitration Board."

Judge Wright did not, in his dissent, express his views on the constitutional questions, other than to say "It seems clear to me that the constitutional issues raised are substantial * * *." Nor did he identify those issues: petitioner's main thrust in the Court of Appeals, on the constitutional question, was on the issue of delegation of legislative power; the Transport Workers' Union urged in that court and renews here its position that the anom-

[2] The interest of the *amicus curiae* is set forth in its motion for leave to file this brief.

alous creature called "Compulsory arbitration" (a) is an unconstitutional deprivation of liberty [3] and (b) is, insofar as its effectuation is entrusted to the courts, an impermissible attempt to extend judicial power beyond the scope of "cases" or "controversies."

Question Presented

Whether the Congress of the United States has the power to create a regulatory agency, styled "Arbitration Board," which, without the consent of the employees affected, may render an award establishing the future terms and conditions of employment of employees on carriers in interstate commerce, by statute providing that the decree or award of such agency "shall be enforceable through such orders as may be necessary by any court of the United States".[4]

Reasons for Granting the Writ

While the phrase "compulsory arbitration" is nowhere mentioned in the statute involved, that phrase has been accepted by all parties and the courts below as a characterization or description of the procedure established by Public Law 88-108.

---

[3] Movant emphatically does not agree with Petitioner (if the quoted phrase was intended as a concession) that "The fixing of terms and conditions of employment is a legislative process"—except as to *minimum* standards, for reasons of health or public safety. See especially, *infra*, pp. 13-14.

[4] Technically, it may well be that the sole question presented is whether the question stated is substantial enough to have required the convening of a three-judge court. In that connection, it is not without significance that counsel for the Carrier defendants submitted at the District Court level a separate fifteen-page "Memorandum on Behalf of the Carrier Defendants with Respect to the Constitutional Issues." Issues justifying so much attention by eminent counsel may, without more, be deemed substantial.

Actually it was recognized four decades ago that "compulsory arbitration" is a misnomer and a contradiction in terms. *Wolff Packing Co.* v. *Court of Industrial Relations*, 267 U. S., at pages 564-5.

The very phrase "arbitration" in the meaning and content it has developed in our evolving industrial society, ever since collective bargaining became recognized as an essential constitutent element of that society, has been totally incompatible with compulsion.[5]

A classic statement of the case for voluntariness as an integral part of the character of labor arbitration was made by the dean of them all, Professor Shulman, in the document that was reflected in several facets of the *Steelworkers' Cases*, in 363 U. S. 564, 574, 593, *Reason, Contract and Law in Labor Relations*, 68 Harvard L. Rev. 999, 1016-1017:

> "A proper conception of the Arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties * * * to the extent that the parties are satisfied that the arbitrator is properly performing his part in their system of self-government, their voluntary cooperation in the achievement of the purposes of the collective agreement is promoted."

That conception was asserted in the *Steelworkers'* cases and reaffirmed in *Drake Bakeries, Inc.* v. *Local 50, Ameri-*

---

[5] "Arbitration in the true sense is voluntary." *Updegraff & McCoy, Arbitration of Labor Disputes*, 1961, page 9.

"No one is under a duty to resort to arbitration unless by clear language he has so agreed": *Lehman* v. *Ostrovsky*, 262 N. Y. 130, 132.

"It begins with and depends upon an agreement of the parties to submit their claims to one or more persons chosen by them to serve as their arbitrator": *Sturges*, "*Arbitration—What Is It*", 35 N. Y. U. L. Rev. 1031.

And see Goldberg *introduction*, Labor Arbitration—A Symposium, 37 N. Y. U. L. Rev. 350, 360: "The agreement to arbitrate * * * is not imposed on the parties, but is the product of their reasoned choice * * *."

can Bakery & Confectionery Workers, AFL-CIO, 370 U. S. 254, 256-7: "'[A] party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'"

This is more than mere semantics. Just as voluntary arbitration is a natural ally to and part of democratic collective bargaining, so compulsory or involuntary "arbitration" is antithetical to and incompatible with the collective bargaining process.

The Board whose award is now challenged on this appeal may have been referred to in the statute a number of times as a board of "Arbitration". That did not make it so. It is and was a Board for the *regulation* of contract terms between employers and employes. It is and was a Commission for the imposition on the parties of terms and standards to govern their future relations. However, as the court said in *Wolff Packing Co.* v. *Court of Industrial Relations*, 267 U. S. 552, 565: "Our present concern is with the essence of the system rather than its name", and so the self-contradictory and intrinsically meaningless phrase "compulsory arbitration" will be accepted for the balance of this proposed brief.

There is a further definition of terms which is the key to the distinction we wish to stress and the conclusion we wish to urge. That distinction was overlooked entirely below. It is the distinction between (a) the arbitration of *grievances*, that is disputes as to the meaning or application of existing agreements voluntarily entered into, and (b) arbitration of *future relations*, that is the promulgation by a third party of one or more of the terms and conditions of a prospective relationship.

There are, to say the least, "profound differences in the functions of grievance arbitrations and the arbitration of new contract terms", Givens, *Validity of Delayed Awards*, 16 Arb. J., 161, 178.

With respect to adjudication of grievances, even in the absence of an agreement to arbitrate, "compulsory" disposition by a third man is hardly offensive. Persons in a contract relationship ordinarily contemplate and may be held to have agreed that *some* tribunal be authorized to determine differences that arise during the life of the contract. In the ordinary course of events, in the absence of an agreement to arbitrate, a grievance dispute can well become the subject of a complaint for remedial or declaratory relief in a court of competent jurisdiction. Such a dispute clearly presents a case or controversy within the competence of a court.

When, however, a legislature, in order to relieve the burdens on its courts of general jurisdiction, or by agreement of the parties, creates a tribunal, for the adjudication of *grievance* disputes, that is neither outrageous nor incompatible with the bargaining process. That is almost precisely what was held (and *all* that was held) in *Brotherhood of Railway Trainmen* v. *Chicago R. & I. R. Co.*, 353 U. S. 30. The review of the legislative history in Mr. Chief Justice Warren's opinion in *Chicago River* (353 U. S. 37-9) supports the view that the "compulsory" referral of grievance disputes involving the Brotherhood was, in effect, *voluntarily agreed upon by the labor organization.*

The elimination of collective bargaining by entrusting to a public Commission the task of dictating *future* economic terms and working conditions involves such a radical change in society as we know it, as to require for its authorization a constitutional amendment. Certainly it calls for the exercise of this Court's power of review when, *for the very first time in our history*, Congress has sought to establish a means of dictating to employers and employees what the terms of employment shall be.

A perceptive observer of the work of this Court has seen in *New York Times et al.* v. *Sullivan* (Nos. 39, 40, O. T. 1963)

a renewed demonstration of the "lesson * * * that we have a living Constitution, one able to meet new threats to a free society". (Mr. Anthony Lewis, March 11, 1964). Compulsory arbitration, albeit offered in a small dose, and disguised with a statutory recital that "prefers solutions reached through collective bargaining" (P. L. 88-108, Sec. 1, 5th "Whereas"), is a threat to our free society which must be measured against the Constitution.

It is the position of the Transport Workers Union that American constitutional freedom forbids industrial government by decree.

A.

To begin with, it can be pointed out that when the Constitution was written there were *no* mass production industries, *no* railroads, *no* mechanical means of interstate transportation, *no* national labor unions, *no* conception nor thought of collective bargaining or industrial democracy.

Our Constitution has repeatedly proved itself to be an instrument of government "made for an undefined and expanding future", *Hurtado* v. *California*, 110 U. S. 516, 530. Compare Reich, *Mr. Justice Black and the Living Constitution*, 76 Harv. L. Rev. 673, 735: "in a dynamic society the Bill of Rights must keep changing in its application or lose even its original meaning. There is no such thing as a constitutional provision with a static meaning."

Our industrial society developed far faster than the philosophy needed to recognize its injustices. In 1920, the then Chairman of the War Labor Board, Professor Felix Frankfurter, wrote in the *Yale Review*, decrying the industrial troubles which he believed due to "insistence of employers upon individual dealings with their men," and denying that unrest was "un-American."

> "Industrial unrest is bound to continue just so long as the present state of mind and feeling of work-

> ers is generated by growing disparity between their participation in politics and their exclusion from industrial direction" (*Law & Politics*, 1939, p. 213).

There began, then, four and one-half decades of evolving government interest in labor relations, during which Professor Frankfurter's exhortation was obeyed, and the fruit was described by Dean Shulman, 68 Harv. L. Rev. at 1002:

> "Collective bargaining is today, as Brandeis pointed out, the means of establishing industrial democracy as the essential condition of political Democracy, the means of providing for the workers' lives in industry the sense of worth, of freedom, and of participation that democratic government promises them as citizens."

Eminent authority has agreed that "collective bargaining is industrial democracy," and urged in opposition to a recently proposed "Court of Labor-Management Relations"—a tribunal to set labor conditions by decree—that this proposal may

> "be democracy's ultimate testing against alien society where the dictator's decree has no constraint upon it."

The speaker was the Hon. W. Willard Wirtz: the subject—the "Challenge to Free Collective Bargaining", the date—January 1963, as recorded at page 296, 308-9, at the proceedings of the 16th annual meeting of the National Academy of Arbitrators.

Secretary Wirtz has not been alone in this denunciation of "Compulsory Arbitration". The late Senator Taft said, in 1947;

> "The solution of our labor problems must rest on a free economy and on free collective bargaining. * * * but if we impose compulsory arbitration or if we give the government power to fix wages at which men must work for another year or for two years to come, I do not see how in the end we can escape a collective economy". (93 Cong. Rec. 3835, 3836).

This position was epitomized by the United States Chamber of Commerce in its statement:

> "Compulsory arbitration is incompatible with our democratic form of government. Such a conclusion follows naturally from the premise that free collective bargaining would fall into discard". (cited in Teller, *What Should Be Done About Emergency Strikes?* 1 Lab. L. J. 263, 272.

Some of these views were summarized in Van De Water, "*Involuntary Arbitration and National Defense,*" 18 Arb. J. 96, 100:

> "Involuntary arbitration is wholly inconsistent with the democratic freedoms and ideals which we cherish.
>
> "The end result of a system which begins with imposing compulsory arbitration is a system of totalitarian government.
>
> "The imposition of compulsory arbitration puts an end to free collective bargaining; for the parties will not seriously negotiate when they know their decision will be made for them".

It may be urged in defense of Public Law 88-108 and the estimable gentlemen who acted as the government representatives on the Board appointed thereunder that such broad and terrifying images cannot fairly be drawn concerning them or the issues on which they were called to pass, in view of the special and unusual history of the controversy that preceded the enactment of the law.

It is fair, in response, to quote from Mr. Justice Frankfurter's concurring opinion in *Youngstown Co. v. Sawyer*, 343 U. S. 579, at page 594:

> "The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of the unchecked disregard of the restrictions that fence in even the most distinterested assertion of authority".

It is the position of this *amicus curiae* that in the context of our present industrial society and in recognition of the indispensability of free collective bargaining to our democracy, there should be recognized as part of the concept of "liberty of contract" an appropriate and meaningful content. This would be quite distinguishable from the synthetic "liberty" or misconception of liberty that prevailed among the generation of judges that decided such cases as *Coppage* v. *Kansas*, 236 U. S. 1; *Adkins* v. *Children's Hospital*, 261 U. S. 525; *The Court of Industrial Relations* cases, 267 U. S. 552, etc., and *Wilson* v. *New*, 243 U. S. 332.

Liberty of contract must be redefined in the present industrial context to mean that *free collective bargaining* has become one of the liberties protected by the Fifth Amendment and beyond abridgement by the Congress.

The question, then, is not whether the Congress has power to avert a crippling strike: it is whether it may do so by means destructive of liberty protected by the Fifth Amendment. In *Wilson* v. *New*, *supra*, it was not *held* that power to compel "arbitration" existed. It was casually remarked, in a *dictum* wholly unnecessary to the decision, but without presentation of the issue for adjudication.

The respondent United States below, on the Constitutional issue, relied mainly on *Wilson* v. *New*, *supra*, and other cases approving the fixing of *minimum* terms: a legislative proscription of sub-standard conditions. The setting in which the President's message, which resulted in the Adamson Act in 1916, was prepared, makes clear that it was a determination *only* of what was sub-standard that there concerned the Congress. The same distinguished contemporary observer, cited above, wrote in a letter to the Boston Herald on October 9, 1916 (Prof. Felix Frankfurter, see *Law & Politics*, 1939, p. 203):

> "Experience amply demonstrates that men, women and children work too long from the point of view of the quality of the resulting citizenship. The history of the lowering of standards of military

> requirement, the serious disclosure in England after the Boer War as to the deterioration of English factory workers, the testimony of General Gorgas— the most successful health administrator of the world— that poverty rooted in low wages and long hours is the greatest enemy to health, are all there to read for him who wants to be informed".
>
> * * * * therefore, the President was right in urging the 8 hour day was one that behind it 'judgment of society'. He was right in adopting that as a policy for legislative action".

A similar approach was reflected in the argument presented by the Solicitor General in *Wilson* v. *New*, as summarized at page 334 of 243, United States:

> "The efficiency and safety of railroad service depend upon the skill and physical fitness of the employees. It is just as necessary to properly care for employees as to keep in good condition the physical instrumentalities used in interstate commerce".

The injection of the idea of "compulsory arbitration" into the opinion in *Wilson* v. *New* may have been an effort to enlist Judges (compare the dissenting opinion of Mr. Justice McReynolds reported at pages 388-9 of 243 U. S.) whose concept of liberty was later rejected by a Court whose compassionate interpretation of the Constitution, to accommodate it to an industrial society, dates from about 1937.

The dictum on the subject of "compulsory arbitration" in *Wilson* v. *New* deserves no greater present vitality than the dictum of a few years earlier in *Plessy* v. *Ferguson*, 163 U. S. 537, on the subject of "separate but equal" accommodations.

The reconstruction of constitutional doctrine to meet the realities of a large-enterprise society and to build industrial democracy has been evident with respect to the *means* of securing organization of labor: picketing has been transformed from the "sinister name" of *American*

Foundries v. *Tri-City Council*, 257 U. S. 184, 205, to the constitutionally protected "liberty of communication" of *Thornhill* v. *Alabama*, 310 U. S. 88.

Collective bargaining, as the *end* secured by the organization of labor, must be as securely protected from encroachment as picketing and leaflet distribution, the *means* of securing such organization.

The commerce power which had so narrow a scope in the era of *Wilson* v. *New*, extends now to the food a farmer grows to feed his animals, *Wickard* v. *Filburn*, 317 U. S. 111. The due process protections of the Fifth Amendment must be available to prevent that pervasive power from obliterating the genuine, meaningful "liberty of contract" that collective bargaining has come to be.

B.

Another basis for constitutional proscription of the statutory scheme of Public Law 88-108 is found in Article 3, Section 2, of the Constitution, limiting the jurisdiction of courts to "cases" and "controversies".

The statute provides not only for the filing of the "award," as a purported award under the Railway Labor Act, in the United States District Court for the District of Columbia; it also provides in Section 7(b) that *all* of the obligations imposed by the Joint Resolution

> "Upon suit by the attorney general, shall be enforceable through such orders as may be necessary by any court of the United States having jurisdiction of any of the parties".

Those obligations include refraining from changing or proposing to change rates of pay, rules or working conditions, or from engaging in any strike with respect thereto, or from disobeying, after it is rendered, the decree or award of the Board for the determination of working conditions.

Thus, the judicial power of the United States is employed and meshed in the web of "contract draftsmanship". That is, the drafting and enforcing of prospective terms and quasi-legislative writing of standards of railway labor relations, becomes intertwined with the procedures of the federal courts. Cf. *Boston Printing Pressmen's Union* v. *Potter Press*, 141 F. Supp. 533, aff'd 241 F. 2d 787, C. D. 353 U. S. 217.

In that case Judge Wyzanski pointed out the distinction we have stressed above between a *grievance* arbitration and a *future relationship* arbitration and construed the United States Arbitration Act as not having been intended to embrace the latter. He thereby avoided the necessity of deciding whether the requirements of Article 3, Section 2 of the Constitution "preclude Congress from conferring upon courts the power to enforce a quasi-legislative arbitration program". He did point out:

> "this court deems it undesirable to jump into what may be a bottomless pit of dispute over future working conditions. Perhaps, on reflection, no one would be happy to have judges again exercising quasi-legislative magistracy over labor problems of uncertain dimensions."

In commenting on Judge Wyzanski's decision in 58 *Northwestern Law Review*, at page 562, n. 26, it was observed that it was regrettable that the constitutional question was not explored further:

> "The non-justiciable, or non-quasi judicial character of these disputes might prevent them from being considered 'cases or controversies'."

See also, concurring opinion, *Youngstown Co.* v. *Sawyer*, 343 U. S. 579, 594:

> "Judicial power can be exercised only as to matters that were the judicial concern of the courts of Westminister, and only if they arise in ways

that to the expert feel of lawyers constitute 'cases' or 'controversies.'"

As was said in *Matter of Buffalo & Erie R. R. Co.*, 250 N. Y. 275, 278:

> "No power exists in the courts to make contracts for people."

We respectfully submit that decreeing the terms and conditions of employment without the consent and against the will of the parties, to be operative for the future, cannot constitutionally be the subject of a proceeding as intricately interrelated with court procedures as that of the Agency-Board-Commission that acted below. Compare *Keller* v. *Potomac Electric Co.*, 261 U. S. 428 and *Radio Commission* v. *G. E. Co.*, 281 U. S. 464.

If, as Judge Wyzanski concluded, the Constitutional question he faced was substantial enough to require a particular statutory interpretation, it is substantial enough to call for review by this Court.

C.

The vital public interest in the preservation of free, democratic, collective bargaining is a constitutionally protected interest as well. Certainly, constitutional questions that are raised for the first time as to validity of the process of labor-relations-by-decree, established in P. L. 88-108, are substantial enough to have deserved consideration by a three-Judge Court.

It is especially striking that the occasion for the Congressional innovation of a dictated and imposed solution relates to a dispute about the very survival of employment itself. Shall men be deprived of the opportunity to bargain about and defend themselves against being cast into the "other America" of poverty and deprivation?

> "It is one thing to bargain about terms and conditions of employment and quite another to bar

gain about terms of unemployment, about the conditions on which men are to yield their jobs to machines."

So said Secretary Wirtz to the National Academy of Arbitrators (op. cit. *supra*) and we concur.

It is respectfully submitted that this Court should issue a writ of certiorari to review the decision below.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 935

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, ET AL., *Petitioners*,

v.

CERTAIN CARRIERS REPRESENTED BY THE EASTERN, WESTERN, AND SOUTHEASTERN CARRIERS' CONFERENCE COMMITTEES, CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY, ET AL., *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

APPENDICES TO RESPONDENT CARRIERS' BRIEF IN OPPOSITION

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APPENDIX I

BEFORE THE

ARBITRATION BOARD

Established by Joint Resolution of Congress
Approved August 28, 1963

Public Law 88-108

National Mediation Board

Arbitration Board No. 282

CERTAIN CARRIERS REPRESENTED BY THE EASTERN, WESTERN, AND SOUTHEASTERN CARRIERS' CONFERENCE COMMITTEES

and

CERTAIN OF THEIR EMPLOYEES REPRESENTED BY THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, BROTHERHOOD OF RAILROAD TRAINMEN, AND THE SWITCHMEN'S UNION OF NORTH AMERICA

Opinion of the Neutral Members

We write this opinion as the neutral members of a statutory arbitration board—a board whose creation was virtually forced upon Congress as the only way of avoiding a nationwide railroad strike. Never before in peacetime has Congress found it necessary to take such action. We wish at the very outset to record our regret that in this case the leaders of the railroad industry and the railroad operating unions were unable to agree upon some method of resolving their differences which would avoid the need for Congressional intervention. The great virtue of arbitra-

tion as it has developed in this country's labor relations has been the fact that it was a *voluntary* procedure, created and shaped by the disputing companies and unions themselves and thus responsive to their peculiar problems, values, and needs. It is unfortunate that the parties in this case, though finally agreeing in principle to arbitration, failed to agree upon the terms and procedures of an arbitration agreement and thereby abandoned to Congress an opportunity and responsibility that should rightly have been theirs.

We have been asked to decide only two of the issues which separate the parties: the so-called "fireman (helper)" issue and the so-called "crew consist" issue. It is the evident hope of Congress that once these two issues have been settled, agreement on the remaining issues can be reached in direct collective bargaining. All citizens must join in the hope that failures of leadership—on either side—will not again make it necessary for the Government to do for the parties what the parties should do for themselves.

Preliminary Comments

Both of the issues before us concern manning and the effect on manning of technological progress and change. In view of the present national concern with such questions—with problems of automation and unemployment—the limitations under which we must deal with these issues should immediately be made clear. We are an arbitration board, established to settle two particular points of controversy in a specific labor dispute. Though our authority comes from Congress, the issues we must decide were framed by the parties, and the scope of our action cannot exceed the scope of the actions which the parties themselves might have taken with respect to these issues had they been able to reach agreement. There are many questions of general social policy, community action, or legisla-

tion which bear on the problems before us, but they are not within our purview.

In approaching our task we have been fully aware of the handicaps imposed upon us not only by our relative unfamiliarity with the complex problems of railroad operation but also by the narrow time limits within which we have been compelled by the Joint Resolution to complete our work. We have had to base our judgments entirely upon the evidence and arguments presented to us by the parties in the formal context of adversary proceedings. Our brief personal inspection of a few representative types of diesel switching operations permitted us only to gain a better understanding of what the parties were telling us. These difficulties, however, only underscore the gravity and importance of our task; they cannot relieve us of our obligations.

The issues in this case involve an obvious distinction between questions concerning *jobs* and questions concerning *men*. Another distinction, however, is equally important: that between the question whether a job is unnecessary and the question whether and in what manner an unnecessary job should be eliminated. Neither the issues nor the Board's award can be understood unless these distinctions are kept in mind. In dealing with both the fireman and the crew consist issues we have established a procedure for determining whether, considering safety, workload, and adequacy of transportation service, particular jobs should be made subject to elimination. The sharpest and most stubborn disagreements have been over this procedure—over any question, indeed, that affected the number of jobs which might be declared "blankable" within a given length of time. It is important to realize, however, that *declaring a job "blankable" under the terms of the Board's award does not necessarily result in the immediate elimination of that job or the layoff of its occupant.* The Board's award makes the actual elimination of jobs subject, in most cases,

to attrition—to the vacating of jobs by the natural processes of retirement, transfer, voluntary quit, discharge, or death. The determination that a job is "blankable" will usually mean, not that an employee will be laid off, but only that, when it becomes vacant, no new employee need be hired to fill it.

The provisions of our award are explained in general terms in this opinion, without reference to certain refinements spelled out in the award. In the event of any inadvertent conflict between the explanation given in this opinion and the precise language of the award, the latter is, of course, intended to govern.

The Board's award will remain in force only two years. Within that time the effect of attrition may be such that the number of firemen or train crew jobs actually eliminated may be comparatively small. Problems that are as deeply rooted and that have been as long in development as those here involved, however, cannot be solved overnight. In this case, rapid readjustment could have a human price too great to pay. If, through this award, principles are established and procedures set in motion which contribute to a final solution, our hopes as neutral members of this Board will have been fulfilled.

The Parties and the Issues

The dispute before us involves almost all of the Nation's major railroads and the five railroad operating brotherhoods. The railroads (often referred to herein as the "carriers") are represented by the Eastern, Western, and Southeastern Carriers' Conference and by the National Railway Labor Conference. Together they conduct about ninety per cent of all railway operations in the United States. The brotherhoods (often referred to herein as the "organizations") are the Brotherhood of Locomotive Engineers (BLE), the Brotherhood of Locomotive Firemen and Enginmen (BLF&E), the Order of Railway Conduc-

tors and Brakemen (ORC&B), the Brotherhood of Railroad Trainmen (BRT), and the Switchmen's Union of North America (SUNA), the first two representing "engine service" employees and the last three "train service" employees. In all, some 200,000 employees are represented in the dispute.

The assignment, duties, and compensation of these operating employees are governed by a complex structure of rules, agreements, laws, and understandings which has developed through decades of practice and collective bargaining and which has roots running back to the turn of the century and beyond. This structure has persisted with comparatively slight adjustment, despite drastic changes in railroad technology and equipment, in the competitive position of the railroads and in the general pattern of American industry with regard to wage rules and fringe benefits. Both parties are now seeking to change and—in their own terms—"modernize" this structure. But they disagree sharply as to the nature, direction, and rate of the desired changes and as to how and by whom the price of change should be paid.

One of the central points of disagreement concerns the continued use of firemen (sometimes—and particularly in yard switching operations—referred to as "helpers")[1] on locomotives, such as diesel-electric or electric locomotives, which do not use steam power and on which the work of firing the boilers therefore need not be performed. In 1937, when the "dieselization" of railroad power was just beginning and its future was still uncertain, the carriers and the BLF&E entered into a National Diesel Agreement which, in substance and as since modified in certain details, requires the employment of a fireman on all locomotives,

[1] For the sake of simplicity and to avoid the cumbersome "fireman (helper)" locution, we will hereafter call the second member of the engine service crew a "fireman," even though the parties might sometimes call him a "helper."

whether or not they used steam power, with the exception only of certain yard switchers below a specified weight and certain electric rail cars or self-propelled rail motor cars or construction machines. This requirement remains in effect, even though "dieselization" has since swept the industry and even though there are now only a handful of steam locomotives in service. The carriers accept the continued use of firemen on passenger diesel locomotives, where there are now only two men in the cab. They assert, however, that in road freight operations, where the head brakeman is in the cab to provide left-hand lookout, and in yard switching operations, where the ground crew guides the engineer, no fireman is needed for lookout or signal-passing duties, and that the present duties of firemen in connection with the detection and correction of mechanical or electrical malfunctions can be performed—and, indeed, often *are* performed—by engineers and shop maintenance men in the normal course of their work. For some years, therefore, the carriers have been pressing for the modification of the National Diesel Agreement and the right to eliminate all firemen positions. The organizations have resisted the move, claiming that the work performed by a fireman—left-hand lookout, signal passing, engine inspection, and the correction of malfunctions—is still necessary and cannot properly be performed by other employees.

A second central point of difference concerns the make-up—or "consist"—of train service crews in road and yard service. This matter is usually regulated, not by national rule, but by a wide variety of local agreements, rules, and practices, and—in a number of states—by statute or administrative decision. It is the carriers' position that many of these regulations are out of date and fail to reflect recent developments which have lightened the workload of the train service crews, such as the decline in less-than-carload lot freight shipments; the fall-off in passenger traffic and baggage-handling work; and the spread of auto-

matic block signals, centralized traffic control systems, "hot box" detectors, radio or telephonic communication systems, and other work-saving devices. The carriers contend that because of the lack of relationship between workload and required crew size many trainmen have little or nothing to do. The carriers are pressing, therefore, for the modification or elimination of all rules or agreements that restrict their right to determine crew size. The organizations resist, claiming that modern developments such as the increased size and speed of freight trains and the competitive pressures for rapid switching and transfer operations have added to the work and responsibilities of many train crews and that, in any case, crew size is a matter for negotiation and agreement rather than unilateral determination.

History of the Dispute

The formal beginning of the dispute came on November 2, 1959, when—pursuant to Section 6 of the Railway Labor Act—the carriers served the organizations with notices of proposed changes in many work and compensation rules, including those bearing on the fireman and crew consist issues, just discussed. With regard to the "Use of Firemen (Helpers) on Other Than Steam Power," the carriers proposed the elimination of all regulations—including, of course, the National Diesel Agreement—which required the employment of firemen on other than steam power in any class of freight or yard service. They do *not*, it must be emphasized, propose the elimination of such regulations in passenger service. They also proposed a new national rule which would give management the unrestricted right to decide when and if a fireman should be used in freight and yard service. With regard to the "Consist of Road and Yard Crews," the carriers proposed the elimination of all regulations, however established, applicable to the consist of crews in road or yard service, which require: (1) a stipulated number of trainmen or more than one conductor in

any crew used in any class of road service; (2) a stipulated number of brakemen or helpers or more than one conductor or foreman in any crew used in any class of yard, transfer, or belt line service; or (3) a conductor or trainman in connection with the movement of light engines or in pusher or helper service, or an engineer, conductor, or trainman in pilot service.

Counter-proposals were submitted by the organizations on September 7, 1960. Under the heading "Minimum Safe Crew Consist" they proposed, in the first place, a new national rule which would extend the use of firemen even to those classes of locomotives, such as light switching engines or electric rail cars, on which firemen had not previously been required. In the second place, with regard to train crews, they proposed a rule which would require not less than one conductor (foreman) and two trainmen (brakemen, helpers) in all classes of train service, plus "such additional employees as are required to assure maximum safety."

It is needless, here, to give a detailed history of all the local and national negotiations, the mediation procedures, the studies, the investigations, the court proceedings, the recurrent crises, and the Government efforts that culminated, at last, in Congressional action. It is enough to mark those stages in the development of the dispute which have direct relevance to the issues before us and to which we will be returning as we consider these issues on the merits. They may be summarized as follows:

1. *The Presidential Railroad Commission.* This Commission, requested and agreed to by both parties, was appointed by the President in November, 1960. It was composed of fifteen members, divided equally between carrier, organization, and public representatives. Directed to inquire into the dispute and report its findings and recommendations, it devoted more than thirteen months of study

to the issues, held extensive hearings, conducted independent studies, made field inspection trips on trains and at railroad installations and, in the light of the information thus gathered, endeavored unsuccessfully to find a basis for a mediated settlement. The report of its public members, issued on February 26, 1962, contained detailed findings on each of the issues and a series of far-reaching recommendations for the modification or review of many work rules, including those relating to the fireman and crew consist issues, and for a major revision of the railroads' pay structure. The carrier members filed a statement expressing dissatisfaction with the report but nevertheless accepting it. The organization members filed dissenting or separate opinions rejecting most of the recommendations, including those bearing on the fireman and crew consist issues.

There followed a series of unsuccessful negotiations pursuant to the Railway Labor Act, announcement by the carriers of their intention to put work rule changes into effect, and litigation by the organizations to forestall such action. The litigation ended in March of this year in a Supreme Court decision that the parties

> " . . . having exhausted all of the statutory procedures, are relegated to self-help in adjusting this dispute, subject only to the invocation of the provisions . . . for the creation of an Emergency Board."[2]

2. *Emergency Board No. 154.* This Board, composed of three public members, was established by the President on April 3, 1963, following an announcement by the carriers of their intention to put their proposed rules changes into effect and notice from the organizations that such action would result in an immediate strike. Though it had access to the records of the Presidential Railroad Commission,

[2] Brotherhood of Locomotive Engineers v. Baltimore and Ohio Railroad, 327 U.S. 284 (1963).

it did not attempt to redo that Commission's work. Rather the Emergency Board devoted its efforts almost entirely to the mediation of the dispute, seeking, as it said, "constructive solutions rather than the mere restatement of the previously fixed positions of the parties," and exploring "paths which may develop into avenues of settlement." It issued its report on May 13, 1963, recommending with regard to each issue a series of guidelines and procedures which might serve as a framework for further collective bargaining. Both as to the fireman issue and the crew consist issue, the recommended procedures included arbitration as a means of settling unresolved issues. The carriers offered to accept the recommendations. The organizations declined either to accept or reject the report, but stated that it could be "a useful tool in the search for a fair and suitable settlement."

3. *Negotiation and Mediation—May through July, 1963.* Following the report of Emergency Board No. 154, there was a period first of direct negotiation between the parties and then of intensive mediation by the Secretary and Assistant Secretary of Labor joined by the Chairman and Members of the National Mediation Board, the thirty-day statutory status-quo period being extended, at the President's request, to July 10, to permit these mediation efforts to proceed. We will later refer to certain of the proposals, memoranda, and written or oral statements which the parties issued during this period. At this point only three things need be noted. (A) *The Secretary of Labor's proposals of July 5 for the disposition of the fireman and crew consist issues, by accepting the principles of the report of Emergency Board No. 154 and arbitrating specific rules.* These proposals were accepted by the carriers but rejected by the organizations on the ground that they involved arbitration. (B) *The President's proposal of July 9 that all issues be submitted by agreement to Associate Justice of the Supreme Court Arthur J.*

Goldberg for final determination. The carriers accepted this proposal. The organizations rejected it. (C) *The Investigation and Report of a Subcommittee of the President's Advisory Committee on Labor-Management Policy.* This Subcommittee, which the President appointed on July 10, after the parties had agreed to a further extension of the status quo to July 29, made no recommendations but reported to the President as to the nature of the issues and the positions of the parties.

4. *Referral to Congress.* The President, on July 22, sent a special message to Congress, transmitting the report of the Subcommittee of the President's Advisory Committee on Labor-Management Policy, and recommending, in substance, that for a two-year period and pending agreement on the disputed issues, the Interstate Commerce Commission should have authority to rule on proposals for interim changes in work rules. Lengthy hearings on this proposed legislation were held both by the Senate Committee on Commerce and the House Committee on Interstate and Foreign Commerce. Before both bodies, representatives of the parties appeared and stated their positions on the issues in dispute. At the urgent request of members of the House and Senate Committees, the parties once more agreed to an extension of the status quo—this time to August 29, 1963—and the Secretary of Labor undertook further efforts to mediate the dispute.

5. *The August 2 Documents of the Secretary of Labor.* On August 2, the Secretary of Labor submitted documents to the parties regarding the fireman and crew consist issues. In an accompanying memorandum, he stated that the documents were intended to identify, with respect to each issue, those areas in which, in his judgment, there was the largest possibility of agreement. The papers were based either on previous recommendations, or on the public, or exchanged, statements of the parties, with some modifications made by the Secretary himself. He urged

that negotiations proceed promptly on the basis of the documents and undertook to continue mediation sessions "until agreement is reached or until it is clear that agreement cannot be reached—and why it cannot be reached."

There followed a series of meetings and discussions designed to clarify the meaning of the August 2 documents and to develop the positions of the parties with respect to those documents. On August 12, however, it became clear that the parties were deadlocked and could not reach final agreement on the merits of either issue.

6. *The August 15 Proposal for Voluntary Arbitration.* After the final breakdown of negotiations, the Secretary of Labor proposed that the parties submit the two key issues—fireman and crew consist—to final and binding arbitration by a six-man board, two members to be appointed by the carriers, two by the organizations, and two by the President. The Board was to make its award within ninety days and was itself to decide the period for which the award would be controlling. The remaining issues were to be taken up by the parties after their receipt of the award.

The carriers accepted this proposal. The organizations indicated their acceptance in principle but rejected certain of the procedural provisions. Efforts to bring the parties to agreement on the terms and procedures of an arbitration agreement were unavailing.

Thus, by August 28, after four years of collective bargaining, exhaustion of the mediation procedures of the Railway Labor Act, investigation and recommendations by two Presidential Commissions, and intensive mediation by the Secretary and Assistant Secretary of Labor and the National Mediation Board, there was still no settlement and the country was faced again—as it had been repeatedly during the course of the dispute—with a nationwide railroad strike. As the President had stated in his message to

Congress, such a strike would force the almost immediate shutdown of all the industrial establishments which depend primarily on rail shipments; would jeopardize the fruit and vegetable and grain crops; would disrupt mail service and commuter traffic and—if it lasted even thirty days—would result in the layoff of some 6,000,000 non-railroad workers in addition to the 700,000 idled railroad employees, a rise in unemployment to fifteen per cent, and a drastic decline in production and in our competitive position in foreign and domestic markets. Faced with this prospect, despite this country's traditional opposition to arbitration compelled by law Congress adopted the Joint Resolution, Public Law 88-108, which created this Board and initiated the present proceeding.

The Joint Resolution established this Board as a seven-man, tripartite arbitration board, similar in status to those functioning under the Railway Labor Act and subject, insofar as is consistent with the Joint Resolution, to the procedural requirements of Sections 7, 8, and 9 of that Act. It submitted the fireman and crew consist issues to the Board for final and binding determination. It directed the Board to begin its hearings within thirty days and to make and file its award in the United States District Court for the District of Columbia within ninety days after the Joint Resolution's enactment. The award is to become effective sixty days after filing and is to continue in force for a maximum of two years, unless the parties agree otherwise.

The Board has today completed the task which Congress set it. After holding twenty-nine days of hearings, receiving the testimony of more than forty witnesses recorded in almost 5,000 pages of transcript, examining more than 200 documentary exhibits, together with a number of motion pictures, photographs, and charts, making inspection trips to four railroad yards in the Chicago area and discussing the issues at length in

executive session, the Board has executed and filed its award on the fireman and crew consist issues.

The Joint Resolution and the Board's Approach

The outer limits of our jurisdiction are set by the notices of proposed changes in the rules and agreements with which the parties initiated this dispute. In Section 3 of the Joint Resolution, Congress provided that the Board

> ". . . shall make a decision . . . as to what disposition shall be made of those portions of the carriers' notices of November 2, 1959, identified as 'Use of Firemen (Helpers) on other than Steam Power' and 'Consist of Road and Yard Crews' and that portion of the organizations' notices of September 7, 1960, identified as 'Minimum Safe Crew Consist' and implementing proposals pertaining thereto. . . ."

Congress did not, however, leave the matter there. Asserting in the preamble to the Joint Resolution the desirability that the dispute be settled "in a manner which preserves and prefers solutions reached through collective bargaining," it directed the Board's attention to the suggestions for the settlement of the fireman and crew consist issues which the Secretary of Labor had made to the parties on August 2, 1963, during the final stages of his mediation efforts. It asked the Secretary to furnish these suggestions to the Board and to inform the Board as to

> ". . . the matters with respect to which the parties were in tentative agreement and the extent of disagreement with respect to matters on which the parties were not in tentative agreement."

It then directed that the Board

> "shall incorporate in such decision any matters on which it finds the parties were in agreement, shall resolve the matters on which the parties were not in agreement, and shall, in making its award, give due consideration to those matters on which the parties were in tentative agreement."

Furthermore, in laying down standards for our guidance, Congress directed that we consider not only the effect of our award upon adequate and safe transportation service to the public and upon the interests of the affected carriers and employees, but also to

> "... the narrowing of the areas of disagreement which has been accomplished in bargaining and mediation."

In accordance with these instructions, the Board's endeavor has been to deal with these issues within the context of the parties' own bargaining, searching for areas of agreement or tentative agreement or, lacking these, of common emphasis and approach. It has not been an easy task. Though the parties largely agree as to the objective circumstances and sequence of their various meetings and the substance and subject matter of their discussions, they are in sharp disagreement whether any of the positions taken represent commitments which should properly be continued and built on by this Board. The problem has been complicated, further, by the fact that the parties often met, not with each other, but with the Secretary of Labor or his assistants and thus had only second-hand knowledge of each other's positions.

In spite of these difficulties, however, no single aspect of this case has received more of our attention than our obligation, under the Joint Resolution, to give due consideration to whatever agreements or tentative agreements the parties reached in their bargaining. Our conclusions are as follows.

As to the fireman issue, though we have found no binding commitments, we have found a large area of at least tentative agreement regarding the benefits and protections that might appropriately be provided to displaced firemen. On the question of the relative equities of firemen of different lengths of service and different degrees of

attachment to the industry, moreover, the parties substantially agreed as to general principles, though disagreeing as to the manner in which those principles should be implemented. And even in those areas where disagreement was sharpest—the cluster of issues touching on the proposed elimination of firemen's jobs—we have found a common recognition that, where a job has been determined to be unnecessary, the equities of the fireman working on that job may nevertheless properly affect the method and timing of its elimination.

All of these questions, however, have to do primarily with the treatment of *individual* firemen. With regard to the treatment of firemen's *jobs* we have found next to nothing in the way of agreement that could serve as a meaningful foundation for our award.

It is true, as the Secretary of Labor says in his memorandum to the Board, that

> "The principle of blanking a fireman (helper) job if, but only if, there is no fireman (helper) on the fireman (helper) seniority list available to fill a vacancy which develops, if filling the vacancy would require a new hire and if blanking the job will not unduly endanger safety or unduly burden other employees was accepted by both parties."

The first portion of this agreement on principle, however, has to do less with *jobs* than with *individuals*; it is an expression of the attrition principle that the "blanking" of a job should be dependent upon the prior exhaustion of individual seniority rights. As to a practical method of determining whether "blanking a job will . . . unduly endanger safety or unduly burden other employees," we found basic disagreement. Both parties recognized that to proceed on a job-by-job basis would result, to use the language of Emergency Board No. 154, in a "hailstorm of grievances" and, in all probability, an equal "hailstorm" of requests for arbitration by a special board.

There was long and detailed discussion, during the summer months, of the principle that certain categories of jobs could be agreed to in advance as not requiring case-by-case review to determine safety and undue burden and that jobs in other categories could be made "blankable" only by agreement or after review by a special board of adjustment. But as to what classes of jobs should be assigned to what categories, as to whether or not there should be a completely non-blankable category, and as to the category sequence which should be followed in blanking jobs, we found stubborn disagreement. Organization proposals on these questions, though repeatedly discussed, amended, and refined, were never accepted by the carriers. Finally, and most important, there was absolutely no agreement by the carriers to the organizations' proposal that there should be an overall limitation on the number of firemen's jobs that might for any reason, be eliminated. Though the organizations repeatedly claimed that their proposed system of job categories, category sequences, attrition arrangements, and blanking procedures would result in the elimination of some 5,500 jobs, and eventually offered to guarantee that figure, the carriers never agreed to any maximum figure whatsoever.

With regard to the fireman issue, then, though we have been able to develop and complete the parties' tentative agreements concerning the treatment of individual firemen, we have found no substantial structure of agreement on which we could base our award concerning the proposed elimination of firemen's jobs. We have had only the suggestion that if the "hailstorm" of disputes could be reduced by a system of categories, review of questions of safety and undue burden by special boards of adjustment would be a manageable and acceptable procedure. In the face of disagreement concerning the category system, this offers little foundation on which to build. In treating the *job* phase of the issue, then, we have had no

alternative but to start from scratch, studying the evidence as to the duties and functions of firemen, drawing our own conclusions as to the general need for firemen on locomotives that do not use steam power, and attempting ourselves to develop a practical system of determining which jobs, if any, may be eliminated.

With regard to the crew consist issue there is far more evidence of agreement and tentative agreement. We have been able to confine ourselves almost entirely, therefore, to the development and refinement of these agreements, the resolution of minor issues, and the cleaning up of details. Both parties seem to have agreed that determinations of proper crew size could best be made locally and that the main problem is one of establishing a satisfactory procedure for the review of such determinations and satisfactory guidelines for the reviewing agency. Both parties seem also to have agreed that the actual process of eliminating jobs found to be unnecessary should be controlled by natural attrition. The principal disagreements concern, on the one hand, the *scope* of the review procedure (i.e., what classes and sizes of crews should be reviewable) and, on the other hand, the *scope* within which attrition should operate (i.e., whether protection should extend only to those actively employed or to furloughed employees as well).

We turn now to a more detailed discussion of the issues.

THE FIREMAN (HELPER) ISSUE

Basis of Findings

In view of the lack of agreement between the parties on the need for firemen in road freight and yard service, we have found it necessary to consider the issue as framed by the initial notices of the parties.

The testimony, exhibits, and arguments submitted to this Board on this issue covered the same areas, though not

always in such exhaustive detail, as those dealt with by the parties' presentations to the Presidential Railroad Commission. Thus, in both proceedings the principal points emphasized were (1) the lookout function in freight and yard service; (2) the mechanical function in freight and yard service; (3) relief of the engineer in both types of service; (4) findings of other tribunals dealing with some aspects of the fireman's role; (5) foreign experience related to the issue; and (6) the essentiality of firemen as a future source of engineers.

We shall not attempt to summarize in this opinion the considerable body of evidence introduced by the parties on these various subjects during the course of the instant case. It would be impossible to do so within manageable limits without paraphrasing or omitting references to many matters which the parties deemed important; such an attempt, as is evident from the organizations' reaction to the report of the Presidential Railroad Commission, would only lead to misunderstanding and resentment. Accordingly, on this point we shall limit ourselves to two observations. First, we believe that to the extent that it has been humanly possible within the limited period of time available, we have reviewed and given due consideration to all evidence and argument submitted to us by the parties on this issue. Second, in our judgment the substance of the parties' presentations to us is essentially the same as that referred to in the Commission's report, and no useful purpose would be served by our covering the same ground again in this opinion. We emphasize, however, that although the Commission's report is part of the official record in this case, and we have given it such persuasive weight as we think it deserves—which is considerable—we have not felt bound by its conclusions, nor does our award necessarily imply agreement with all of them.

Our own independent examination of the record before this Board leads us to the following findings and conclusions:

1. The record contains no evidence to support the charge, frequently and irresponsibly made, that firemen presently employed in road freight and yard service throughout the country are being paid to do nothing and actually perform no useful work.

2. The lookout function presently assigned to the fireman is also performed by the head brakeman in road freight service and by all members of the train crew in yard service. In the great majority of cases the lack of a fireman to perform the related functions of lookout and signal passing will not endanger safety or impair efficiency because these functions can be, as they are now, performed by other crew members.

3. A considerable portion of the mechanical duties now performed by the fireman is not absolutely essential to the safety and efficiency of road freight and yard operations. Those duties which are essential can be performed by the engineer while the locomotive is in service and by shop maintenance personnel at other times. These arrangements would not involve the assignment of fireman's duties to members of other crafts not presently authorized to perform them.

4. Relief of the engineer by the fireman in road freight and yard operations is of critical importance only in the event that the engineer suddenly becomes incapacitated by death or illness. In road freight service the usual presence of the head brakeman in the cab obviates the need for a fireman in such an emergency. In yard service the normal lack of a third man in the cab is offset in part by the reduced speed of the locomotive, and will be offset still further by installing a dead-man control in all yard

engines, which our award requires as a condition precedent to the operation of such locomotives without a fireman.

5. Both the Presidential Railroad Commission and Emergency Board No. 154 have concluded that in most instances firemen are not required in road freight and yard service. In addition, several emergency boards and one arbitration board in this country, although not dealing with precisely the same issue, have ruled adversely on related proposals by the BLF&E and the BLE.

6. Much of the evidence adduced by the carriers on the manning of locomotives on foreign railroads is not readily subject to verification. In any event the many differences in equipment and in operating practices and conditions between American railroads and those of other countries render comparisons in respect to this issue of little or no value.

7. The essentiality of firemen as a future source of engineers was not emphasized in the proceedings before this Board, and there is not much evidence in the record to support any meaningful conclusions. It is apparent, however, that even if the provisions of our award should continue unchanged, firemen on passenger trains will provide a substantial pool of potential engineers for freight as well as passenger service. In the event that a shortage of engineers develops, there should be no serious difficulty in establishing special training and upgrading programs.

In short, although our findings on this issue do not coincide on all points with those of the Presidential Railroad Commission, and although we think it clear that firemen are presently performing useful services, we agree with the Commission "that firemen-helpers are not so essential for the safe and efficient operation of road freight and yard diesels that there should continue to be either a national rule or local rules requiring their assignment on all such diesels." Like the Commission, however, we also

believe that this conclusion should not "preclude the occasional assignment of firemen-helpers on some of the road freight or yard runs which are atypical and which have unusual characteristics." Specifically, we are satisfied that a certain number of such assignments require the continued employment of firemen in order to prevent excessive safety hazards to lives and property, to avoid imposing an undue burden upon the remaining crew members, and to assure adequate and safe transportation service to the public. Of these three considerations, that of safety of railroad employees and equipment seems to us, in the context of this case, to require the most careful attention.

This last observation merits a brief additional comment and explanation. It may be fairly stated that concern with safety has pervaded this entire proceeding. It was apparent in the presentations and arguments by all the organizations and by the carriers, and was further emphasized by the inquiries which members of the Board directed to witnesses and counsel. Safety is, of course, essentially a relative concept; once adequate minimum standards have been achieved, the decision as to how much more safety is required must necessarily be governed by all the accompanying circumstances. Railroading is, unfortunately, a hazardous occupation, and the problem before us cannot be viewed simply in terms of preventing or not preventing accidents. We wish to make it absolutely clear, however, that our judgment on this question has not been affected by considerations of cost or ability to pay.

Reductions in Jobs

One of the most formidable problems confronting this Board and everyone else who has sought a means of resolving the instant dispute is to devise some practicable way to determine the extent and character of the excep-

tional cases in which the employment of firemen in road freight and yard service is necessary or prudent. The Presidential Railroad Commission concluded that the exceptions were so rare that it was neither feasible nor desirable to establish any procedure for identifying them. By making no recommendation on this point, the Commission, in effect, left the assignment of firemen in road freight and yard service to the discretion of management.

Emergency Board No. 154 adopted a different approach. Unlike either the Commission or this Board, it made no findings on the merits of the fireman issue but simply set forth its understanding of the respective positions of the parties, together with suggestions as to how the dispute might be resolved. Thus, it noted that "the brotherhoods do not contend that there are no jobs presently occupied by firemen which cannot be abolished," and that "the carriers, being realists, have suggested that there may be a few freight situations in which the services of a fireman are needed." The Emergency Board proposed a review procedure to determine, in disputed cases, whether the discontinuance of a fireman's job "would unduly endanger safety or unduly burden other employees who would have to take on some of the responsibilities formerly performed by the firemen." It expressed the belief that, properly administered, these principles could be applied so as to prevent both the arbitrary elimination of jobs and abuse through a flood of baseless grievances.

The procedures suggested by the Emergency Board contemplated the assistance of neutrals in establishing "certain categories of jobs or situations the elimination of which by the employer would probably be protested on the basis of safety or undue hardship." They also contemplated the "definitive disposition" by neutrals of unresolved disputes within a fixed period of time, although the way in which this latter suggestion was to be translated into action was not made entirely clear.

In the negotiations which followed the issuance of the Emergency Board's report the parties discussed various ways of accomplishing the review of those situations in which management's decision to eliminate a job would be challenged on grounds of safety hazard or undue burden. The Secretary of Labor's memorandum of August 2, which was based in part on the Emergency Board's report and in part on previous documents and statements of position by the parties, and which served as the principal basis for the ensuing discussions of the issue by the parties with various Government mediators, suggested that road freight and yard jobs be classified into groups of categories. Jobs in the first group would be considered blankable in accordance with a prescribed sequence of categories within that group. Disputes over whether a given job fell within that group, or within one or another of its categories, were to be finally resolved by a special board of adjustment. Jobs in the second group of categories were to be blankable only if the result would not unduly endanger safety or unduly burden other employees. Disputes over these questions were also to be finally resolved by a special board of adjustment. Jobs in the third group of categories were not to be blanked except by agreement of the individual carrier and the organization representing the employees involved.

As previously indicated, the parties differ sharply as to the extent of agreement, if any, they reached on the terms of the August 2 memorandum. Our conclusion is that although the memorandum provided the focal point for their negotiations and in that sense may be said to have brought about a narrowing of the issues, the parties remained in hopeless disagreement on the crucial questions of the numbers and types of jobs on which firemen need no longer be employed, and the sequence and methods of their removal from service.

The Joint Resolution, although providing the means for finally disposing of the principal issues in this long-stand-

ing dispute, also introduced two additional complications. The first is the requirement that the award "shall constitute a complete and final disposition" of the issues submitted to the Board. That statement means, among other things, that the Board cannot delegate to any other body the power finally to determine any of the matters in dispute, except in accordance with relatively restricted and precise standards.

In our opinion sufficient knowledge upon which to base such standards could be obtained only by first-hand observations on the property of each of the carriers involved in this case. In this respect the fireman issue differs markedly from the crew consist issue, as to which the parties themselves developed twenty detailed guidelines for resolving disputes over the manning of train crews. Conversely, on the basis of the record on the fireman issue the Board would be hard put to prescribe standards more definite than those of avoiding safety hazards and the imposition of undue burden on remaining crew members, and insuring adequate and safe public transportation. It is doubtful whether a referral by this Board of cases in which the need for a fireman is disputed to a subsidiary board or boards, with instructions to resolve such disputes on the basis of the general standards just mentioned, would satisfy the statutory command that the Board's own award must constitute a "complete and final disposition" of the issues.

The second complication introduced by the Joint Resolution is the provision that the Board's award shall in no event remain in force for more than two years after its effective date. This means that even if the Board were able to devise legally adequate standards which could be applied by subsidiary bodies to resolve disputes over the necessity for firemen in specific situations, the administrative difficulties involved in making such determinations in sufficient time to yield any significant results would be overwhelming.

The foregoing observation will, perhaps, become more meaningful when one considers the magnitude of the problem confronting the parties. The number of firemen's jobs in road freight and yard service involved in this dispute exceeds 30,000. So deeply are the parties divided on the issue of the need for firemen in road freight and yard service that the predictable attempts by the carriers to eliminate virtually all of these jobs would almost certainly be promptly and vigorously challenged. As the number of such disputes on the various railroads increased, so would the difficulty of obtaining the services of qualified neutrals to resolve them. Considering the probable size of the case load, the likelihood of reducing it significantly in a two-year period would not be very great. Moreover, even the application of uniform standards in all cases would not guarantee consistent results. Finally, the costs to the parties of these numerous proceedings would be very high. In short, we are convinced that the arbitration of disputes over the need for firemen in road freight and yard service on a case-by-case basis on each railroad, even if legally permissible, would simply not be administratively feasible.

It thus becomes necessary to find an appropriate substitute for the arbitration of these types of disputes—the only method of final disposition contemplated by the Emergency Board or seriously considered by the parties during their lengthy negotiations. The procedure we have devised for this purpose involves two steps, for each of which we have specified reasonable time limits. The first step is to be taken by the individual carrier. Within one week from the effective date of the award in this case, it will have the right to establish two lists of crew assignments—one for freight engine crews and one for yard engine crews—then in effect within each fireman seniority district. The crew assignments thus listed may include all of those which, in the judgment of the carrier, based upon considerations of safety, undue work burden on other

crew members, and adequate transportation services to the public, do not require the services of a fireman.

The second step is to be taken by the organization representing the firemen in the given seniority district. After receiving the two lists and discussing them with the carrier, the organization will have the right, based upon considerations of the same criteria of safety, undue burden, and adequate public transportation service, to designate up to ten per cent of the crews on each of the two lists in which a fireman must continue to be employed. The organization's judgment as to which crews must continue to use a fireman will be final and not subject to challenge.

At three-month intervals the two-step process described above will be repeated in each seniority district of every carrier covered by this award. The number of jobs included by the individual carrier in each of the two lists will vary according to the number of diesel locomotives in service at that time, but the proportion of listed crew assignments on which the organization may insist that a fireman be employed will remain a constant ten per cent.

On its face this procedure would seem to permit the individual carriers immediately to stop assigning firemen on ninety per cent of the freight engine crews and yard engine crews which they listed initially. That it will not have such an effect is due to three reasons. First, it will be necessary to provide jobs for firemen whose rights to continued employment are guaranteed by the terms of the award. (This aspect of the problem is discussed in greater detail below.) Second, a number of States, by law or administrative regulation, require the use of firemen in road freight or yard service. Finally, in respect to yard locomotives, the Presidential Railroad Commission recommended that no yard locomotive should be operated without a fireman unless and until it is equipped with a dead-man control in good operating condition, and the carriers have

indicated from the outset their willingness to accept that recommendation.

We do not represent the foregoing procedure to be ideal or foo proof, but we think its virtues of simplicity, certainty, speed, and economy outweigh whatever shortcomings it may have. Both sides have reasonable objections. The carriers point out that the organizations are given absolute authority to decide whether firemen are needed on ten per cent of the crew assignments in road and in yard service. There is no evidence to support the suggestion that the organizations will exercise this power to preserve high-paying jobs rather than to secure the continued assignment of firemen to those crews in which, in their own best judgment, firemen are needed to insure safe and efficient operation. In any event, such ill-advised use of authority would be contrary to the firemen's self-interest. Their concern about safety, in particular, is at least as great as that of anyone else; and we can reasonably assume that those crew assignments on which the organizations elect to protect the fireman's job will for the most part be those which they regard as most hazardous to operate without a fireman.

The organizations, on their part, argue that for reasons of safety and efficiency, firemen are needed on far more than ten per cent of the road and yard engine crews. We do not agree. Admittedly, there is something arbitrary in designating any fixed percentage of engine crew assignments as being so potentially unsafe as to require the services of a fireman. As previously indicated, however, our study of the record has convinced us that the number of road freight and yard assignments in which considerations of safety and efficiency dictate the need for firemen is relatively small. In allowing the firemen's organizations sole discretion to decide that firemen must be used in up to ten per cent of all crew assignments which the carrier has already concluded can be performed safely and efficiently

without firemen, we think we have provided a sufficient margin for error.

Moreover, we wish to emphasize that our conclusions are not based on the assumption that members of any other craft will henceforth perform duties within the exclusive jurisdiction of firemen. Head brakemen will, as in the past, continue to perform, in addition to their other duties, forward lookout functions on the fireman's side of the engine cab. Indeed, in road freight operations there will be, with only infrequent exceptions, a brakeman in the cab with the engineer at all times. In neither road freight nor yard service, however, do we contemplate that brakemen will be asked or expected to perform mechanical repairs and inspections formerly assigned firemen. To the extent that these functions continue, they will be performed in the manner previously described, either by the engineer or by shop maintenance employees.

Although the award issued by the Board in this case disposes of the issues referred to it by Congress, it cannot prevent similar issues from arising in the future. It is safe to say that no carrier or organization presently involved in these proceedings would welcome a recurrence of this dispute. We have already expressed our sincere hope that the parties will not again forfeit their right to deal privately with their own problems through the procedures of collective bargaining. Expressions of hope, however, are not enough; accordingly, we have included in the award a procedure for the continuing study of the need for firemen in road freight and yard service.

The device we have established for this purpose is a four-man National Joint Board. Two of the members of this Board will be chosen by the carriers, and one each by the BLF&E and the BLE. The selection of representatives is, of course, solely within the discretion of the participating parties. We urge them, nevertheless, seriously to consider appointment to the Board of men with current

and intimate knowledge of and responsibility for the operating problems involved. The functions of the National Joint Board would be reduced to a meaningless charade if its members engaged in adversary debates instead of carefully studying at first hand and discussing the effects which our award has on road freight and yard service conducted without firemen. We would anticipate that the National Joint Board would pay particular attention to the general question whether the award has preserved either too few or too many crew assignments requiring firemen. More specifically, we would expect the Board to study the impact of the award on the safety and efficiency of road freight and yard operations, including the incidence and causes of accidents, delays in service, effects on the public transportation system, and tendencies, if any, to assign duties exclusively within the firemen's jurisdiction to members of other crafts, contrary to the intent of our award.

The carriers' representatives on the Board have urged that the parties not be ordered to establish a National Joint Board, although they have expressed a willingness carefully to consider a recommendation to that effect. They argue that the success of the contemplated study depends upon the willing participation and cooperation of the parties involved and, inferentially, that the enterprise is less likely to succeed if it is established under compulsion. Our appraisal of the present situation convinces us, however, that without the impetus provided by the provision in our award establishing a National Joint Board the parties may experience considerable difficulty in reaching agreement on the simple mechanical details of setting it up. We do not feel justified in taking that chance. All members of this Arbitration Board agree that once the National Joint Board is established, it will succeed to an extent directly proportional to the bona fide efforts of all the participating parties to make it work.

The proposed study to be undertaken by the National Joint Board relates only to the fireman issue and is not intended to encompass any of the problems relating to the consist of train crews. The same types of questions to be studied by the National Joint Board in respect to the employment of firemen in road freight and yard service will, under the terms of our award relating to the consist of train crews, be handled by negotiation and arbitration on the properties of the individual carriers.

Reductions In Employment

Thus far we have discussed in detail only the extent to which firemen's jobs in road freight and yard service are to be eliminated and the manner in which that result is to be accomplished. We turn now to a review of the provisions in our award directly relating to the affected employees.

In dealing with the rights of individual firemen we have, as previously noted, found a general accommodation between the parties in respect to guiding principles, although they have remained in disagreement over details. Thus, there has been agreement that, for purposes of determining individual rights, firemen should be classified in the following categories: (1) those recently hired; (2) those "irregulars" whose employment in the railroad industry has been so sporadic that their average monthly earnings from such employment over a given period have not exceeded a specified dollar amount; (3) those who have been on furlough throughout a given period; (4) those with less than ten years' seniority; and (5) those with ten or more years' seniority. Those portions of our award dealing with provisions for each of these categories of employees are explained in general terms below.

1. *New entrants.* In respect to this category of employees the award provides that firemen hired on or after a date two years prior to the effective date of the award

may be terminated; but in that event such employees will receive a lump sum separation allowance. Employees in this category with two full years of service on the date this award becomes effective will, if terminated, receive a separation allowance of six months' pay; those whose length of service is one year or more but less than two years will receive three months' pay; and employees with less than one year's service will receive a lump sum computed on the basis of five days' pay, at the rate of the position last occupied, for each month in which they performed service.

These relatively liberal provisions are based on a different approach than the one implicit in the recommendations of Emergency Board No. 154. It proposed that "those firemen who obtained employment after some reasonable date when it may be presumed that they were on notice that their jobs might not be permanent may have their employment terminated" without compensation of any kind. Although the concept that employees who accept employment with knowledge that it may be terminated in the near future are entitled to no special consideration when that contingency occurs has the support of logic and legal precedent, we think it has less merit than the principle that the relative equities of dismissed employees should be based primarily on length of service and the degree of attachment to the industry. Job-seekers are not always in a position to make objective judgments about accepting or rejecting job opportunities on the basis of future prospects. Finally, unlike the Presidential Railroad Commission, which recommended that the carriers be permitted to terminate recent entrants under twenty-five years of age six months after the effective date of the proposed national agreement, we have disregarded age as a factor in any of the protective provisions of our award. In our view the relative number of years of satisfactory service in an industry, regardless of age, is a more valid basis for

determining appropriate compensation when the employee is involuntarily terminated.

2. "*Irregulars.*" No proposal for special treatment of this category of employees was included in the Commission's recommendations; the idea was first advanced by the Emergency Board, which made the following recommendation:

> "Those who have been employed in recent times as firemen but on an irregular basis, and who consequently have not been able to rely upon the carriers as their primary source of livelihood, may have their rights terminated with a severance allowance equal to some percentage of their recent earnings as a fireman or they may choose to remain on a seniority list with preferential hiring rights for such jobs as may become available and for which they are qualified."

This recommendation was adopted in principle by the parties in their subsequent negotiations and is reflected in the Secretary of Labor's memorandum of August 2. No agreement was reached, however, on several details, the most important of which were the minimum period of employment necessary to qualify for a severance allowance and the number of months to be used as the basis for computing the severance allowance for those employees who do qualify. Our award in this respect applies to firemen hired more than two years before the date the award takes effect whose average monthly earnings in railroad service have not exceeded $200 during the twenty-four full calendar months preceding the effective date of the award. Those "irregulars" who qualify may elect either to terminate with a severance allowance equal to 100 per cent of their earnings during the preceding twenty-four months, or to remain on the seniority lists with rights to such available work on non-blankable jobs as they are qualified to perform.

3. *Furloughed employees.* The Commission did not make a special recommendation for this category of employees, and the Emergency Board recommended that "firemen who have not been employed in recent times" be terminated with no severance allowance. In their subsequent negotiations the parties accepted this principle, on the theory that employees in this category have relatively little attachment to the industry. The award provides that all firemen who were hired more than two years before the effective date of the award and who have not performed service as an engineer or fireman since that date shall be included in this category.

4. *Firemen with less than ten years' seniority.* In respect to employees in this category not otherwise covered by the terms of this award, the Commission recommended that, except for existing rights and obligations to protect vacancies in passenger service and for promotion to engineer, they be made subject to termination, with appropriate allowances, one year following the effective date of the proposed national agreement. The Emergency Board's recommendations for employees in this category were considerably more liberal, and these provided the framework for subsequent negotiations between the parties.

Our award in this respect simply reflects the substantial area of agreement between the parties. In essence it provides that an employee in this category shall retain his right to fireman's employment unless and until offered a comparable job for which he is, or can become, qualified. The offer of another job carries with it certain guarantees, including relocation expenses, continuation of applicable fringe benefits, and guaranteed annual earnings for a maximum of five years.

5. There has never been any dispute in these proceedings over the status of firemen with ten or more years of seniority. Our award reflects the agreement between the parties that all firemen in that category who are not "ir-

regulars" or on furlough shall retain all existing employment rights, except as modified by the provisions of the award relating to reduction of jobs, and that, in any event, they shall not be terminated except for cause or by natural attrition.

Crew Consist Issue

It has been explained earlier in this opinion that the size of road and yard crews in other engine service has never been the subject of a national rule in the railroad industry. The consist of these crews, involving primarily helpers and road brakemen, has been determined generally by local rules, practices, state full crew laws or regulations issued by State Public Utility Commissions. Only a relatively few carriers are unrestricted in determining the size of crews, and it is doubtful if even they have complete freedom to change crew size as they wish. It is clear from the evidence before us that the myriad of local arrangements has led to numerous inconsistencies in the manning of crews. It is equally clear that some of the existing rules, originating as they did more than a half-century ago, are anachronistic and do not reflect the present state of railroad technology and operating conditions.

We find from the testimony and evidence that some overmanning exists in road-and-yard crews as a result of schedule rules and local agreements. Though the evidence as to undermanning is less persuasive, we must also acknowledge this possibility on some assignments. One of the difficulties confronting this Board is the same that confronted the Presidential Railroad Commission. It is the inability to determine from the evidence the extent to which overmanning or undermanning exists. The carriers submitted to our Board, as they did to the Commission, an estimate that approximately 19,000 employees were unneeded in all classes of service. However, a more recent survey (November 1, 1963) made by the carriers at our request indi-

cated an estimated total of substantially less than 19,000. The only conclusions we may derive from available data are that judgments vary considerably among operating people concerning the adequacy of crew size and that the problem of overmanning, to the extent it exists, varies greatly from carrier to carrier. The organizations submitted no concrete evidence of undermanning.

It is apparent to us that the consist of crews necessary to assure safety and to prevent undue workloads must be determined primarily by local conditions. A national prescription of crew size would be wholly unrealistic. Some yard service crews, for example, now consist of one foreman and one brakeman, while others consist of one foreman and as many as ten brakemen. The variation depends on a great complex of factors, reflected by the guidelines mentioned below. Though the range is less pronounced in road service, it also makes unfeasible a definitive national rule.

In their argument the carriers point out that "operating conditions, operating methods and service requirements vary greatly from railroad to railroad, from division to division and from yard to yard on the same railroad, and, over significant periods of time, on the same division and in the same yard." It is not possible, they say, "to write a rule or rules that would accommodate the consist of crews to such variation in conditions." For this reason, they urge the elimination of all agreements, rules, regulations, and practices requiring the employment of a stipulated number of trainmen and propose, further, that management should be given the unrestricted right under any and all circumstances to determine the size of crew consist.

The disarming simplicity and the incisiveness of the carriers' approach cannot obscure the basic flaw in the premise upon which it is founded. Simply stated, that premise is that management shall have the absolute right to determine the consist of crews. If adopted, the carriers'

notice of November 2, 1959, would certainly permit local determination and consideration of the many factors affecting adequacy of crew size. But we are not prepared in this situation to award the carriers such a degree of authority. It may well be, as the carriers argue, that a rule giving management the absolute discretion to determine the consist of crews would be self-policing, and that the maintenance of safe and fast service, essential to economic survival, would be a safeguard against abuse of its discretionary powers. The employees involved, however, are entitled to more protection than is afforded by these assurances of good-faith. They have a legitimate interest in workload and in safety, and this interest must be given due consideration under the Joint Resolution. For this reason alone it is doubtful if a ruling favoring the carriers would constitute adequate compliance with the statute creating this Board. Under the carrier proposal the employees would be deprived of an opportunity to express effectively their views on a matter of great concern to them; they would lack an avenue for redress if a carrier operating official abused his discretion or erred greatly in his judgment of the safety hazards and workload involved. In this industry, as the Presidential Railroad Commission stated, there has been a traditional "collective bargaining interest in the matter of crew consist." We agree with the Commission's view that the "collective bargaining process should remain the basic method for resolving disputes concerning this matter."

The organizations' proposal is unsatisfactory for several reasons. First, by prescribing minimum crews for all classes of service, the organizations' notice of September 7, 1960, fails to give consideration to local conditions except for those requiring crews in excess of the minimum. Second, it provides no method for correction of overmanning that may now exist because of schedule rules. Third, it makes no provision for the resolution of unresolved disputes. Finally, although the most prevalent

crew consist, in other than passenger service, is a conductor (foreman) and two brakemen (helpers), this fact provides the basis for only the most tentative generalizations. It does not justify a national rule establishing this as the minimum consist ratio. Some assignments were cited in the record before us in which the present consist is one conductor and one brakeman. The organizations offered no testimony or evidence to show that these situations were undermanned; yet the effect of their proposal would be arbitrarily to increase these consists by one man.

The mandate of Congress in the Joint Resolution that this Board shall give due consideration "to those matters on which the parties were in tentative agreement" and "to the narrowing of the areas of disagreement which has been accomplished in bargaining and mediation" plays a significant part in the final award on this issue. As we have previously noted, negotiations during the summer of 1963 on the crew consist issue, unlike those on the fireman issue, resulted in tentative agreements and a clear narrowing of the areas of disagreement. This conclusion is supported by the testimony of carrier and organization witnesses and by the documents received from the Secretary of Labor.

The approach taken in the 1963 negotiations followed the recommendations of Emergency Board No. 154. That Board defined the real issue as the "choice of the most appropriate mechanism for adjusting any undermanning or overmanning of individual crews which may exist." It concluded, as we have from the evidence before us, that crew consist was essentially a local problem, best handled by local negotiations. Emergency Board No. 154 then made these provocative suggestions:

> "It should be possible for the parties in direct bargaining to establish guidelines nationally to provide overall direction for these local negotiations. These guidelines ought to be based on considerations of safety and

efficiency and of undue burden on other members of the crew. Alleged violation of these guidelines would then be discussed locally."

It suggested further that if negotiations failed to resolve the matter, submission to a special referee procedure should be provided.

It is unnecessary to describe in detail the changes in positions of the respective parties as bargaining continued during the summer months. During the summer months both parties had accepted the general approaches recommended by the Emergency Board, and, by August 2, 1963, were bargaining within the following framework of an agreement: (1) the remanding of the crew consist issue to the local properties for negotiations; (2) the adoption of a provisional rule pending agreement at the local level; (3) acceptance of the principle that the rule would provide an opportunity for review of, and possible changes in, the consist of crews in some classes of service, and would foreclose review and change in other classes of service; (4) the development of national guidelines, some of a general nature and some applicable to specific types of service; (5) acceptance of the principle that the merits of any proposed changes in crew consist were to be determined by reference to these guidelines; (6) the referral to a special board of adjustment for final decision of any disputes arising over the application of the guidelines; and (7) provision for employee protection by application of an attrition principle.

It is not suggested that the parties were irrevocably committed to these basic approaches. We recognize, of course, that their acceptance was conditional upon successful resolution of other substantive matters. Nevertheless, bargaining within this framework represented in itself a substantial narrowing of the areas of disagreement. It was impressive indication of the parties' willingness, in

the interest of reaching agreement, to depart from their extreme positions, as expressed in the original notices.

Tentative agreement was reached on substantive matters to be included in a final settlement. It was agreed that all situation other than those involving a crew consist of one conductor (foreman) and two brakeman (helpess) would be reviewable. So-called "one-and-two" situations would remain unchanged. Thus, the organization could seek changes on the basis of alleged undermanning if the present rule or practice called for only one brakeman or helper. The carrier, for example, could seek change on the basis of alleged overmanning if the present rule or practice called for three or more brakemen or helpers. In either case, the guidelines were to govern in deciding the merits of the change sought. Most of the details of the review procedure, other than time limitations for observance of the procedural steps, were worked out successfully. Perhaps of paramount importance was the tentative agreement reached on approximately twenty guidelines, as to which the parties differed only on minor matters of substance or language.

Except for minor modifications, our award reflects each one of these tentative agreements, both in matters of approach and in matters of substance. The progress made by the parties through their own efforts and with the assistance of the Secretary of Labor, the Assistant Secretary of Labor, and the Chairman of the National Mediation Board constituted a long stride toward settlement. We have given due consideration to these tentative agreements in compliance with the statute. We have adopted them in our award because they are consistent with our understanding of the merits of the issue on the basis of the record before us. To the guidelines tentatively agreed upon by the parties, we have added one, necessitated by the terms of our award on the fireman issue. It requires that the parties and the system boards of adjustment take into account the presence or absence of a fireman as it may effect the adequacy of crew size.

Our principal task has been the resolution of those matters of substance about which there was disagreement. There were two such matters. The first, and more important, concerned which crews would be subject to review and possible change where the present stipulated composition was one conductor (foreman) and two brakemen (helpers). The second concerned the exact nature of the attrition principle to be followed.

With respect to the first area of disagreement, the carriers maintained consistently during the 1963 summer negotiations that all yard crew consists should be reviewable, regardless of the present size of the consist; they also insisted that, in road service, review and change of "one-and-two" situations should be permitted on branch lines, secondary main lines, and main lines on which centralized traffic control (CTC) and similar electronic equipment had been installed. In the meetings in late July and thereafter the discussion centered mostly on the inclusion of "secondary main lines," certainly not a term of art recognized in the industry. The organizations sought a definition of what would be involved in secondary main lines. On the basis of the definition given by the carriers, an organization witness concluded that this "would mean an attack on all road crews on what would be about 90 per cent of all tracks outside of yards in this country." The carriers did not challenge this estimate.

The organizations finally expressed a willingness to accept, review and change of "one-and-two" situations on branch lines. They were willing to negotiate the question of secondary main lines, but only when a meaningful or reliable definition of the term was given by the carriers. In addition, they remained firm in their position that only a crew consist of other than "one-and-two" should be reviewable in yard service assignments.

It is evident that this area of disagreement was, as of August 2, 1963, and at the time of our hearings, the prin-

cipal obstacle to the successful resolution of the crew consist issue. That the companion fireman issue remained unsettled was an additional obstacle.

It is our belief that review and possible change in the size of yard service crews should be permitted even in the "one-and-two" situations. Variability of yard assignments and environmental factors is so great that it would be quite feasible for some assignments to be handled by a conductor and one helper without any impairment of safety and without imposition of undue burden on the remaining crew members. In the case of branch line road service crews, we are similarly convinced that review should be allowed, regardless of existing rules as to crew consist. On some branch lines only one train of a few cars operates each day. The carriers made a persuasive showing that under these circumstances it may be adequate to have one brakeman stationed in the locomotive and have the conductor in the caboose. Furthermore, the organizations' offer to permit a broad review of branch line assignments cannot be ignored.

Whether the vaguely-defined "secondary main lines" and main line road service protected by automatic block signals, CTC, or other automatic control equipment, should be treated similarly is a more difficult problem. We have concluded that review and change on these assignments should be limited to consist of crews that involve more or less than two trainmen, and that rules or practices requiring two trainmen should remain unchanged for the duration of the Board's award.

There are several reasons for this conclusion. The first is the practical consideration of controlling the number of potential cases to be heard by the special boards of adjustment during the life of this award. Although the number of jobs subject to review is likely to be a relatively small percentage of the total train service jobs, and although it is expected that the guidelines will yield a sub-

stantial number of negotiated settlements, nevertheless the arbitration burden could be considerable. As a result of the evidence submitted, we are also of the opinion that the justification for downward deviation from the "one-and-two" consist in over-the-road operations was less convincing. Finally, with respect to the category of secondary main lines, at no time did that classification become meaningful to us. The definition submitted by the carriers was ambiguous, and there was no testimony or evidence to show that secondary main lines, as such, involved a serious overmanning problem. In denying the review of present one-and-two situations in these categories of road service, we are not saying that no overmanning or undermanning exists. We are saying only that, for the reasons indicated, it would be wiser to maintain the status quo during the effective period of this award.

The second area of disagreement concerns the application of the attrition principle. Both parties agreed that the actual elimination of jobs found to be unnecessary should be governed by the processes of "natural attrition". The carriers, however, considered this to mean that no employee on the active payroll should lose his employment by reason of job elimination, but when such an employee retired or left his employment for other reasons, he would not have to be replaced if there was a job in the seniority district marked for elimination. The organizations wanted not only present employees to be protected, but also any employees who maintained a seniority relationship in the industry. Thus, those employees on furlough, some of whom might have been on furlough status for a long time, would have to be offered jobs vacated by retirements, deaths, or terminations before any of the unnecessary jobs could be eliminated.

The August 2 document provided that an "employee employed or having an employee relation with the carrier on the date of this agreement" was to be a "protected"

employee, and that no job could be eliminated when to do so would result in a "protected" employee being deprived of employment. This language was derived from an organizations' proposal submitted on July 2, 1963. The organizations assert that there was agreement on this approach to attrition, basing their conclusion on statements by carrier spokesmen in negotiations and before Congressional committees that they accepted the principle of full attrition. The carriers deny that there was agreement on the attrition formula as stated in the August 2, 1963, proposal.

The record before us leads to the conclusion that there was never an agreement between the parties on the exact scope of the attrition principle. Unfortunately, there was little discussion of the matter in the negotiations; the parties were preoccupied more with the scope of the review procedure and the development of guidelines. However, an organization witness testified under direct examination that on June 18 the principal negotiator for the carriers said he "would not be opposed to protect the present regular workforce, but he would be opposed to protection of extra men or employees furloughed." This statement was repeated in a meeting on July 1. This same organization witness, in response to a question by a Board member, said it was correct to say there was "a firm agreement on attrition, provided extra men and furloughed men would not be considered."

In our handling of this issue, as well as the fireman issue, we have adopted the view that the effect of our award should not result in serious hardship to those men who have been attached to the industry for any considerable length of time. Because the number of brakemen and helpers jobs that are likely to be eliminated is such a small percentage of total employment in these crafts, the attrition principle is the fairest method of controlling job elimination.

Our award provides that all employees, other than those on furlough on the date the award becomes effective, are to be regarded as "protected employees." A "protected" employee is to continue as an active employee until he quits, retires, dies, or is discharged for cause. In no way will his employment rights be affected adversely by the award. However, we do not believe that the elimination of a job through natural attrition should be delayed by extending "protected" status to those men who are on furlough as of the effective date of the award. These men will not, as of that date, have a job. In effect, their position is unchanged. They remain on the seniority list and retain any recall rights they now possess. They are affected only if, and to the extent, that the number of jobs to which they might have been recalled will be reduced as a result of this award. The selection of the effective date of the award as the time for determining which employees are to be given protected status seems to us to be reasonable. The determination should be made before the review procedure is implemented, and there is little purpose in making the determination prior to the date provided.

Washington, D. C.
November 26, 1963

APPENDIX II

BEFORE THE
ARBITRATION BOARD

Established by Joint Resolution of Congress
Approved August 28, 1963

Public Law 88-108

National Mediation Board

Arbitration Board No. 282

CERTAIN CARRIERS REPRESENTED BY THE EASTERN, WESTERN, AND SOUTHEASTERN CARRIERS' CONFERENCE COMMITTEES

and

CERTAIN OF THEIR EMPLOYEES REPRESENTED BY THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, BROTHERHOOD OF RAILROAD TRAINMEN, AND THE SWITCHMEN'S UNION OF NORTH AMERICA

Washington, D. C.
November 26, 1963

Award

This Award is made pursuant to Public Law 88-108, 88th Congress, S.J. Res. 102, enacted August 28, 1963.

The organization parties to the dispute named H. E. Gilbert and R. H. McDonald as organization members of this Arbitration Board. The carrier parties to the dispute named Guy W. Knight and J. E. Wolfe as carrier members of the Board. Benjamin Aaron, James J. Healy, and Ralph T. Seward were named as neutral members by the President.

On September 11, 1963, the Board met, elected its Chairman and adopted rules of procedure. On September 23, 1963, in accordance with Section 3 of the Joint Resolution,

the Secretary of Labor furnished to the Board and to the parties to the dispute copies of his statement to the parties of August 2, 1963, together with memorandums setting forth his understanding of the matters with respect to which the parties were in tentative agreement and the extent of disagreement with respect to matters on which the parties were not in tentative agreement.

Public hearings were held in Washington, D. C., on twenty-nine days between September 24 and November 2, 1963, at which witnesses were heard, exhibits introduced and arguments made. Rebuttal exhibits and written arguments were received on November 9, 1963.

On November 6 and 7, 1963, the neutral members of the Board, with the agreement of the parties, visited certain railroad yards in the Chicago area. The sole purpose of these visits was to assist the neutral members in understanding the evidence and arguments presented at the formal hearings and nothing said or shown to them during these visits was accepted as evidence.

During the course of the proceedings, questions arose as to whether certain carriers and certain of their employees were or properly should be parties to the dispute and subject to the Board's jurisdiction. The carriers with regard to which such questions arose were the Union Railroad Company, the Florida East Coast Railway Company, and the Elgin, Joliet & Eastern Railway Company. The Board declined to rule on these jurisdictional questions on the grounds that final determination of the Board's jurisdiction over any particular carrier and any particular group of employees could be made only by the courts and that time did not permit the Board to conduct the special proceedings required for such a determination. Nothing in this Award, however, and no action by the Board, including the reception into evidence of Carriers' Exhibit No. 1 or Employees' Rebuttal Exhibit No. 33, listing certain carriers as parties to the proceeding, is intended to

prejudice the position of any carrier or any organization as to these jurisdictional questions.

The Board has incorporated in this Award any matters on which it found the parties were in agreement, has resolved the matters on which the parties were not in agreement, and has given due consideration to those matters on which the parties were in tentative agreement. Further, the Board has given due consideration to the effect of the Award upon adequate and safe transportation service to the public and upon the interests of the carrier and employees affected, giving due consideration to the narrowing of the areas of disagreement which has been accomplished in bargaining and mediation.

After a full consideration of the evidence and arguments and upon the entire record, the Board makes a complete and final disposition of the issues submitted and finds and awards as follows.

I. Disposition of Section 6 Notices

Those portions of the carriers' notices of November 2, 1959, identified as "Use of Firemen (Helpers) on Other Than Steam Power" and "Consist of Road and Yard Crews" and that portion of the organizations' notices of September 7, 1960, identified as "Minimum Safe Crew Consist" and implementing proposals pertaining thereto are denied, except to the extent hereinafter provided.

II. Use of Firemen (Helpers) on Other Than Steam Power

Part A—Saving Clause

N(1). All agreements, rules, regulations, interpretations, and practices, however established, with respect to the employment of firemen (helpers) shall continue undisturbed except as modified by the terms of this Award.

PART B—REDUCTIONS IN JOBS

B(1). Within 7 days following the effective date of this Award, each carrier covered by this Award shall have the right to give to each local chairman of the organization representing firemen (helpers) in each fireman (helper) seniority district a list of pool and regularly assigned freight engine crews (including pool and regularly assigned crews used in mixed, miscellaneous, and unclassified services) and a list of regularly assigned yard engine crews (including regularly assigned crews used in transfer, belt line, and miscellaneous yard services) then employed by the carrier in each such seniority district. The two lists shall include those engine crews which, in the carrier's judgment, based upon considerations of safety, undue work burden, and adequate and safe transportation service to the public, do not require the services of a fireman (helper).

B(2). Each local chairman, within 30 days of receipt of the carrier's lists, shall have the right, based upon considerations of safety, undue work burden, and adequate and safe transportation service to the public, to designate the engine crews in which the carrier shall be required to continue to use firemen (helpers); provided, that such designated crews shall not be more than 10 per cent of the freight engine crews, nor more than 10 per cent of the yard engine crews in any seniority district, as such crews are listed by the carrier. Each local chairman's designation of crews to be operated with firemen (helpers), made as provided herein, shall be final and binding upon the parties in interest and shall not be subject to challenge or review: but prior conference shall be had between the parties in interest with respect to the crews to be so designated by the local chairman. The time and place for the beginning of such conferences shall be agreed upon within 10 days after the receipt of the carrier's lists by the local chairman, and said time shall be within 20 days after the receipt of the said lists.

B(3). At 3-month intervals following the date of the carrier's original lists, the carrier shall give to each local chairman lists of pool and regularly assigned freight engine crews and of regularly assigned yard engine crews which have been established or discontinued in each seniority district during the preceding 3 months and which meet the criteria set forth in paragraph B(1) of this Award; and the number of crews designated by the local chairman in which the carrier shall be required to use firemen (helpers) shall thereafter be adjusted, in the manner provided in paragraph B(2) of this Award; provided that not more than 10 per cent of the pool and regularly assigned freight engine crews nor more than 10 per cent of the regularly assigned yard engine crews, then employed by the carrier in any seniority district and included in either list, shall be designated as crews in which firemen (helpers) must be used.

B(4). Copies of all lists herein required to be furnished by the carrier to the local chairman shall be furnished to the general chairman of the organization involved.

B(5). After the expiration of 37 days following the effective date of this Award, the carrier shall not be required to use firemen (helpers) on other than steam power in any class of freight service (including all mixed, miscellaneous, and unclassified services) or in any class of yard service (including all transfer, belt line, and miscellaneous yard services), other than in crews designated by the local chairman, pursuant to the provisions of paragraphs B(2) and B(3) of this Award, except as may be necessary to provide jobs for firemen (helpers) whose employment rights are retained as provided in Parts C and D of this Award; provided that no yard locomotive shall be operated without a fireman (helper) unless and until it is equipped with a deadman control in good operating condition.

PART C—REDUCTIONS IN EMPLOYMENT

C(1). After the expiration of 37 days following the effective date of this Award, the carrier shall not be required to hire firemen (helpers) on other than steam power in any class of freight service (including all mixed, miscellaneous, and unclassified services) or in any class of yard service (including all transfer, belt line, and miscellaneous yard services) unless or until such new hire is needed to man engine crews designated by a local chairman as provided in paragraphs B(2) and B(3) of this Award; and firemen (helpers) that are unneeded to man such designated crews may be separated from the carrier's payrolls and have all of their seniority and employment rights and relations terminated to the extent permitted in the following paragraphs of Part C of this Award.

C(2). Firemen (helpers) hired on or after a date 2 years prior to the effective date of this Award may be separated from the carrier's payrolls and have all of their employment and seniority rights and relations terminated, and in such case shall be entitled to a lump sum separation allowance in an amount to be determined as provided in Section 9 of the Washington Job Protection Agreement of May 21, 1936.

C(3). Firemen (helpers) hired prior to a date 2 years prior to the effective date of this Award whose average monthly earnings as firemen (helpers), hostler helpers, hostlers, or engineers have not exceeded $200 during the 24 full calendar months preceding the effective date of this Award, may be separated from the carrier's payrolls and have all of their employment and seniority rights and relations terminated with a severance allowance equal to 100 per cent of their earnings during the preceding 24 calendar months; or may elect to remain on the seniority lists of the carrier with rights to such work as they are qualified to perform, and which may be or become available to them, as provided in Part D of this Award.

C(4). Firemen (helpers) hired prior to a date 2 years prior to the effective date of this Award, who have not performed service as an engineer or as a fireman (helper) since that date, may be separated from the carrier's payrolls as firemen (helpers) and have all of their employment and seniority rights and relations as firemen (helpers) terminated with no severance allowance.

C(5). The provisions of paragraphs C(3) and C(4) of this Award shall not apply to officers or employees of the organizations representing firemen or engineers employed by the carrier, or to supervisory or management officials of the carrier, or to employees on appropriate leaves of absence, or to discharged employees whose cases for reinstatement are pending, providing, if not so situated, they could have met the minimum requirements of service or earnings.

C(6). All other firemen (helpers) with less than 10 years' seniority on the effective date of this Award shall retain their rights to and obligations to protect engine service assignments as provided by rules in effect on the day preceding the day this Award becomes effective, except as modified by and subject to the provisions of Part D of this Award, unless and until offered by the carrier another comparable job (such as, but not limited to, engineer, fireman (helper), brakeman, or clerk in the same or another seniority district) for which they are, or can become, qualified. The offer of another job shall carry with it relocation expenses as provided for and under the conditions set forth in Section 10 of the Washington Job Protection Agreement of May 21, 1936, the continuation of accumulated seniority rights toward such purposes as vacation and other applicable fringe benefits, and guaranteed annual earnings, for a period not exceeding 5 years, equal to the total compensation received by each such employee as fireman (helper), hostler helper, hostler, or engineer during the last 12 months in which compensation

was received prior to the date of transfer. Such offers of jobs shall be posted and made available to all qualified firemen (helpers) in order of seniority in the seniority district in which the job offered is located. If, within 7 days after notice is posted, no senior man elects to take such offered job, the most junior man then on the fireman (helper) roster in that seniority district must, within 3 days from receipt of written notice, accept the job or all of his employment and seniority rights and relations shall be terminated and, in that event, he shall be entitled to one-half the severance allowance provided for in paragraph C(3) of this Award. If such junior fireman (helper) shall fail to accept such job and thereby terminates his employment as herein provided, the next most junior fireman (helper) on that same roster must accept the job within 3 days from receipt of written notice or forfeit all of his employment and seniority rights and relations with the allowance provided for above. In each case of refusal to accept such job offer the next most junior fireman (helper) shall be required to accept, as provided for above, or forfeit his employment and seniority rights and relations with, in each case, the allowance provided for above until there are no firemen (helpers) with less than 10 years' seniority remaining on the seniority roster for the seniority district in which the job offer is located. Thereafter, the same procedure as is provided above shall be followed in the fireman (helper) seniority district which has its principal extra list for firemen (helpers) closest to the location of the job offered.

C(7). Firemen (helpers) with 10 or more years of seniority as of the effective date of this Award, who are not separated from the carrier's payrolls under the provisions of paragraphs C(3) or C(4) of this Award, shall retain their rights to and obligations to protect engine service assignments as provided by rules in effect on the day preceding the day this Award becomes effective, except as modified by and subject to the provisions of Part D of

this Award, unless and until retired, discharged for cause, or otherwise removed from the carrier's active working lists of firemen (helpers) by natural attrition.

PART D—RIGHTS TO WORK

D(1). Firemen (helpers) who elect to remain on the seniority lists of the carrier as provided in paragraph C(3) of this Award shall be entitled to exercise their seniority rights as firemen (helpers) to available employment in engine crews used in passenger service and in freight and yard engine crews designated by the local chairmen in their respective seniority districts as provided in paragraphs B(2) and B(3) of this Award, as hostlers or hostler helpers, and as engineers in any class of service for which they are qualified; but, such firemen (helpers) shall have no rights to and shall not claim seniority rights to or employment in any other service.

D(2). Firemen (helpers) who remain on the active working lists of the carrier under the provisions of paragraphs C(6) and C(7) of this Award shall have the right to work their turn as firemen (helpers) to the extent that positions as firemen (helpers) are available in their respective seniority districts on locomotives of the type to which firemen (helpers) were assigned and in a class of service calling for the service of a fireman (helper) prior to the effective date of this Award; provided, that such firemen (helpers) shall have no right to jobs that the carrier may discontinue pursuant to the provisions of this Award if other employment in any class of engine service, for which they are qualified, is available to them in their respective seniority districts. Such firemen (helpers) will have their seniority rights, existing as of the effective date of this Award, for promotion in their turn, preserved.

D(3). Extra lists shall be adjusted and firemen (helpers) shall be furloughed and recalled pursuant to the provisions of rules in effect as of the day before the day this Award becomes effective, as modified by and subject to the pro-

visions of this Award; provided, that the carrier shall not be required to use firemen (helpers) covered by paragraph D(2) of this Award in freight or yard crews, other than in crews designated by the local chairmen pursuant to the provisions of paragraphs B(2) and B(3) if the services of such employees are required on the extra list to fill vacancies in crews or positions where firemen (helpers) must be used, as in passenger service or under the provisions of this Award.

D(4). Firemen (helpers) retained in service under the conditions set forth in Parts C and D of this Award, when assigned to the extra lists for firemen (helpers), shall not be called to fill vacancies in crews in freight and yard service which have not been designated by the local chairmen pursuant to the provisions of paragraphs B(2) and B(3) of this Award if and when their services are required to fill temporary vacancies as locomotive engineers, or temporary vacancies for firemen (helpers) in passenger service, or temporary vacancies for firemen (helpers) in crews designated by the local chairmen as provided in paragraphs B(2) and B(3) of this Award.

PART E—CONTINUING STUDY

E(1). Within 30 days following the effective date of this Award, the parties shall establish a National Joint Board charged with responsibility for making an intensive and continuing study of the experience in road freight and yard service with and without the employment of firemen (helpers) during the period that this Award remains in effect. During the 3-month period before the date this Award is due to expire, the National Joint Board shall prepare and issue to the parties a report based on its study.

E(2). The National Joint Board established in paragraph E(1) shall consist of 4 members, of whom 2 shall be selected by the carriers, and one each by the Brotherhood of Locomotive Firemen and Enginemen, and by the

Brotherhood of Locomotive Engineers. The expenses of the Board shall be borne by the participating parties.

III. Consist of Road and Yard Crews (Other Than Engine Service)

Part A—Basic Provisions

A(1). The issue of crew consist (other than engine service) shall be remanded to the local properties for negotiation. Pending the consummation of local agreements disposing of the issue, the following provisions shall govern the use of trainmen (assistant conductors, ticket collectors, baggagemen, brakemen, and flagmen) employed in all classes of road service, including all miscellaneous and unclassified services, and the use of brakemen or helpers employed in all classes of yard, transfer, and belt line service, including all miscellaneous yard services.

A(2). No change shall be made in the scope or application of rules in effect immediately prior to the effective date of this Award, whether established by agreement, interpretation, or practice, which require a stipulated number of trainmen (assistant conductors, ticket collectors, baggagemen, brakemen, or flagmen) in any class of road service, including all miscellaneous and unclassified services, or which require a stipulated number of brakemen or helpers in any class of yard, transfer, or belt line service, including all miscellaneous yard services, except by agreement, or pursuant to the provisions of this Award.

A(3). Either party in interest shall give written notice of any proposed change in any such stipulated number of trainmen (assistant conductors, ticket collectors, baggagemen, brakemen, or flagmen) used in any class of road service, including all miscellaneous and unclassified services, in the following categories:

(a) branch lines, including the use of main lines where necessary to reach initial or final terminals of the branch line train; and

(b) road service where existing rule, practice, or interpretation now requires the employment of more or less than 2 trainmen;

and of any proposed change in any such stipulated number of brakemen or helpers used in any class of yard, transfer, or belt line service, including all miscellaneous yard service. The parties in interest, as that term is used in this Award, shall include only the carrier and the organization representing the class or craft of employees holding seniority rights to the position or positions proposed to be abolished or created in the seniority district or districts in which such changes are proposed. The time and place for the beginning of conferences between the representatives of the parties in interest with respect to such proposed change or changes shall be agreed upon within 10 days after the receipt of said notice, and said time shall be within 15 days after the receipt of said notice.

PART B—REVIEW PROCEDURES

B(1). If no agreement is reached between the parties as to the application of the guidelines enumerated in Part C of this Award, the dispute limited to the application of such guidelines as related to the issue involved may be referred by either party to a special board of adjustment.

B(2). Such special board of adjustment shall be chosen in the following manner:

(a) Each party in interest shall name one member within 10 days after notice has been given that the dispute will be referred to such special board of adjustment; and the two partisan members so chosen, within 10 days after the date of the selection of the second partisan member, shall name the neutral member, who shall be chairman of the board. If the members chosen by the parties shall fail to name the neutral member of the board within 10 days, the National Mediation Board shall be requested to name such

member within 5 days after the receipt of such request.

(b) If either party fails to name a member of the board within the 10 days provided in paragraph B(2)(a) of this Award, the National Mediation Board shall be requested to name such member in lieu of such party and shall also name the neutral member necessary to constitute a board of 3 members, all within 5 days after the receipt of such request.

B(3). Decisions of the special board of adjustment shall be rendered within 60 days after the appointment of the neutral member. A decision of the majority of the board shall be binding upon both parties. The parties shall assume the costs and expenses of their respective representatives. The costs and expenses of the neutral member and any incidental expenses shall be shared equally by the parties unless different arrangements can be made by mutual agreement.

PART C—GUIDELINES

C(1). The special board of adjustment in making its decisions shall be governed by the following general considerations, and, where applicable, particular considerations, although none of these factors alone shall be controlling of the board's decisions.

C(2). General considerations.

(a) Assurance of adequate safety.

(b) Avoidance of unreasonable burden or workload on members of the crew.

(c) Changes in operating conditions, including density of traffic.

(d) Practices regarding the consist of crews in comparable situations where such practices are not in dispute.

(e) Special conditions which exist on any particular assignment.

(f) Duties required in compliance with the carrier's operating rules and instructions applicable to the crew in question.

(g) Physical characteristics of the line to be traversed and in the areas where switching or industrial work is to be performed (including grade and general climatic conditions).

(h) The number of highway, street, road, railroad, or other crossings or intersections to be protected.

(i) State, county, or municipal regulations applicable with respect to highway, street, road, railroad, or other crossings or intersections.

(j) Availability and use of communication equipment (such as, but not limited to, end-to-end train radio, train to way-side radio, and walkie-talkies).

(k) The presence or absence of a fireman in the engine service crew.

(3). Particular considerations—passenger road service.

(a) The amount of baggage and storage mail to be handled on and off the train at intermediate stations by the train crew.

(b) The number of passenger cars handled in the train and passenger count.

(c) The method of handling passenger transportation (tickets).

(d) The number of passengers boarding and leaving the train at intermediate stations.

(e) Duties required other than the above on any particular assignment.

(4). Particular considerations—freight service, including miscellaneous and unclassified services.

(a) The amount and nature of work to be performed en route.

(b) The length of train in context with the amount and nature of work to be performed en route.

(c) Time limitations applicable to the particular assignment.

C(5). Particular considerations—yard, transfer, and belt line service, including all miscellaneous yard services.

(a) The amount and nature of the work to be performed.

(b) Volume of work considered in context with applicable service time limitations.

PART D—EMPLOYEE PROTECTION

D(1). Road trainmen and yard brakemen or helpers, other than those on furlough on the date that this Award becomes effective, shall be known and designated, for the purposes of this Award, as "protected employees."

D(2). A "protected employee," known and designated as provided in paragraph D(1) of this Award, shall retain his rights to and obligations to protect road and yard service assignments (including all assignments in miscellaneous and unclassified road services and all assignments in transfer, belt-line, and miscellaneous yard services) for which he is qualified, as provided by rules in effect on the day preceding the day this Award becomes effective, to the extent that such positions are available to him in his seniority district, unless and until retired, discharged for cause, or otherwise removed from the carrier's active working lists of road trainmen and yard brakemen or helpers by natural attrition; provided, that no such "protected employee" shall have any right to jobs or positions that the carrier may discontinue pursuant to the provisions of this Award if other employment in any such classes of service, for which such employee is qualified, is available

to him in his seniority district. If and when the carrier is required to create new jobs or positions for road trainmen or yard brakemen or helpers, pursuant to the provisions of this Award, such positions shall first be filled, to the extent available, by "protected employees" then filling positions which the carriers would otherwise have the right to abolish or eliminate pursuant to the provisions of this Award, before such jobs or positions may be claimed by other employees of the carrier in accordance with their seniority rights.

IV. DURATION

This Award shall continue in force for two years from the date it takes effect, unless the parties agree otherwise.

Dated: November 25, 1963

BENJAMIN AARON
Neutral Member

JAMES J. HEALY
Neutral Member

RALPH T. SEWARD
Chairman of the Arbitration Board

CONCURRING:

GUY W. KNIGHT
Carrier Member

J. E. WOLFE
Carrier Member

DISSENTING:

H. E. GILBERT
Organization Member

R. H. McDONALD
Organization Member

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 935

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, ET AL, PETITIONERS

v.

CERTAIN CARRIERS REPRESENTED BY THE EASTERN, WESTERN AND SOUTHEASTERN CARRIERS' CONFERENCE COMMITTEES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS, THE UNITED STATES, THE ATTORNEY GENERAL AND MEMBERS OF ARBITRATION BOARD NO. 282, IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 5a-25a) is reported at 225 F. Supp. 11. The opinions of the court of appeals (Pet. App. 1a-4a) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 1964. The petition for a writ of certiorari was filed on March 20, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

In Public Law 88-108, Congress created a special arbitration board to make a binding determination, for a two-year period, of two major issues in the work-rules dispute between the railroads and the labor organizations representing their operating employees, and it also provided a specified procedure for judicial review of that determination. The following questions are presented:

1. Whether the courts below properly refused to convene a three-judge district court under 28 U.S.C. 2282 to consider the constitutional attacks on the Board's decision, on the grounds (a) that the suit challenging the Board's decision was not one to enjoin the enforcement of a statute, but to set aside the Board's Award and (b) that, in any event, the constitutional challenge was insubstantial.

2. Whether Public Law 88-108 provided sufficiently definite standards for the guidance of the Board in making its determination.

3. Whether, in reaching its decision, the Board followed the procedures and standards specified in Public Law 88-108.

STATUTES INVOLVED

The pertinent provisions of the statutes involved are set forth in appendices D, E, F, and G to the petition (Pet. App. 26a-35a).

STATEMENT

This litigation arises out of a controversy between the nation's major railroads and the labor organizations representing their operating employees, over (1) the need for firemen on freight and yard locomotives and (2) the composition of train crews. During the past four and a half years the dispute has been the subject of extensive study, mediation by the Secretary of Labor and the National Mediation Board, recommendations by two impartial presidential boards, and a prior decision by this Court. When all other methods of avoiding a nationwide strike had been exhausted, Congress enacted, in August, 1963, Public Law 88-108,[1] which was intended to provide for a binding resolution of the two major aspects of the controversy for a two year period. The basic facts are undisputed.

1. *Background and Undisputed Facts.*[2] On November 2, 1959, the railroads (the "carriers") served the five interested labor unions (the "labor organiza-

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[1] 77 Stat. 132, approved August 28, 1963; Pet. App. 26a-30a.

[2] This summary is based upon the opinion of the neutral members of the Board (J.A. 35-46), S. Rep. No. 459, 88th Cong., 1st Sess., and the Court's opinion in *Brotherhood of Locomotive Engineers* v. *Baltimore & O. R. Co.*, 372 U.S. 284.

tions") with notices of proposed changes in work rules, including changes in the use of firemen on locomotives not using steam power (the "fireman (helper)" issue) and in the composition of the train crew (the "crew consist" issue).[3] The labor organizations made counterproposals on September 7, 1960. Pursuant to agreement of the parties, the controversies were submitted to a Presidential Railroad Commission composed of fifteen members, five members each representing the labor organizations, the carriers and the public. After thirteen months of hearings and two months of deliberation, the Commission recommended various modifications in the work rules. The railroads accepted the Commission's recommendations but the labor organizations rejected most of them. Further bargaining between the parties and mediation by the National Mediation Board did not produce agreement.

After three unsuccessful periods of negotiations, the carriers announced their intention to put their proposed work rule changes into effect. The labor organizations brought suit to enjoin the changes. On review this Court held that, having exhausted all of the statutory procedures, the parties were relegated

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[3] The fireman is actually the engineer's helper, and is frequently referred to as a "helper", particularly in yard service. The train crew consists of the operating employees other than the engineer and fireman, and is usually composed of a conductor (foreman) and trainmen (in road service) or brakemen and helpers (in yard service). The notices were served pursuant to Sec. 6 of the Railway Labor Act (44 Stat. 582, as amended 45 U.S.C. 156).

to self-help; and that the carriers had a right to make the rule changes, subject only to the creation of an Emergency Board pursuant to Section 10 of the Railway Labor Act. *Brotherhood of Locomotive Engineers* v. *Baltimore & O. R. Co.*, 372 U.S. 284. Under threat of an immediate nationwide strike, the President established Emergency Board No. 154, which issued its report on May 13, 1963, as a basis for bargaining. The railroads offered to accept the recommendations, but the labor organizations stated only that they were "a useful tool" for negotiation.

On July 9, 1963, the President proposed that the parties submit all issues to Mr. Justice Goldberg for final determination. Again the carriers agreed, but the labor organizations did not. After directing an investigation by a subcommittee of his Advisory Committee on Labor Management Policy and receiving its reports, the President, on July 22, 1963, requested emergency legislation to avoid a nationwide rail strike and the resulting injury to the Nation's commerce, health, defense and security. While the congressional committees were holding extensive hearings on the proposed legislation, the Secretary of Labor, at their request, made further efforts to mediate the dispute.

On August 2, 1963, the Secretary submitted to the parties suggestions which were intended to identify the areas which, in his judgment, afforded the largest possibility of agreement on the two major issues (J.A. 140-148, 230-235).[1] Negotiations, conducted primarily through the Secretary, went forward on

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[1] "J.A." refers to the Joint Appendix in the court of appeals.

this basis, but broke down on August 12. On August 15, the Secretary proposed voluntary submission of the fireman (helper)" and the "crew consist" issues to binding arbitration. On August 16, the carriers accepted this proposal and the labor organizations accepted it "with certain reservations," but they were unable to agree upon the terms of a submission.

Congress then enacted Public Law 88-108 (77 Stat. 132, Pet. App. 26a-30a), by which it submitted the two major issues to a special arbitration board for binding determination for a two year period, and instructed the parties to exercise all efforts to resolve the remaining issues by agreement. The congressional decision to provide arbitration to prevent a nationwide railroad strike was premised upon the belief that the statute "simply incorporated in legislation form what the parties had already basically agreed upon," albeit with some resevrations—that is, "arbitration of the two main issues involved" in the dispute.

The Arbitration Board was to consist of seven members: two carrier members and two labor organization members, who were in turn to select three neutral members. In case of disagreement, the neutral members were to be named by the President. The National Mediation Board was to compensate the neutral members and to provide the Arbitration Board with appropriate services and facilities.[6] The Arbi-

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[5] S. Rep. 159, 88th Cong., 1st Sess. p. 9; H. Rep. No. 713, 88th Cong., 1st Sess. p. 13; Clause 7, Pub. L. 88-108, Pet. App. 26a-27a.

[6] Sec. 2, Public L. 88-108, Pet. App. 27a-28a.

tration Board was to render its decision within ninety days, but the decision was not to be effective until sixty days thereafter.[7] All changes in working conditions, except by agreement, and all strikes and lockouts were prohibited for the one hundred and eighty day period during which Public Law 88-108 was to be in effect.[8]

The Arbitration Board was instructed to make an "award" on the portions of the carriers' notices of November 2, 1959, and the labor organizations' counter proposals of September 7, 1960, presenting the "fireman (helper)" issue and the "crew consist" issue (Section 3, Pet. App. 28a). The Board was to conduct its proceedings pursuant to Sections 7 and 8 of the Railway Labor Act (45 U.S.C. 157 and 158), and the Secretary of Labor was to furnish the Board with copies of his statement to the parties of August 2, 1963, and other papers "setting forth the matters with respect to which the parties were in tentative agreement and the extent of disagreement" on remaining matters.[9] The Board was directed to incorporate in its award "any matters on which it finds the parties were in agreement"; to resolve the matters on which they were not in agreement; and to give due consideration to the matters on which the parties were in "tentative agreement," to "the narrowing of the areas of disagreement which has been accomplished in bar-

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[7] Sec. 5, Pub. L. 88-108, Pet. App. 29a.

[8] Secs. 1 and 8, Pet. App. 27a, 30a.

[9] Sec. 3, Pet. App. 28a.

gaining and mediation," to the interests of the carriers and employees, and to the effect of the Award "upon adequate and safe transportation service to the public."[10] The Board's Award was to constitute a complete, final and binding disposition of the issues, but was not to remain in effect for more than two years, unless the parties agree otherwise.[11] The Award was made subject to the review provisions of Section 9 of the Railway Labor Act (45 U.S.C. 159, Pet. App. 30a-32a) and the United States District Court for the District of Columbia was designated as the court in which the Award was to be filed.[12]

2. *Proceedings before the Arbitration Board.* The four members appointed by the parties having failed to agree, the President appointed the three neutral members to the Arbitration Board, which was designated as Arbitration Board No. 282. The Board held 29 days of hearings, beginning on September 24, 1963, at which it heard 40 witnesses; examined over 200 documentary exhibits; made inspection trips; and heard and considered the oral and written arguments of the labor organizations and the carriers (J.A. 47). In addition, the Board considered two memoranda dated September 23, 1963, submitted by the Secretary of Labor, which set forth his understanding of the extent of agreement, tentative agreement and disagreement on the two issues. Attached to the memoranda

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[10] Secs. 3 and 7(a), Pet. App. 28a and 29a.

[11] Secs. 3 and 4, Pet. App. 28a-29a.

[12] Sec. 4, Pet. App. 28a-29a.

were his suggestions of August 2, 1963, and related papers (J.A. 133-224, 225-271).

On November 26, 1963, the Board issued its Award (J.A. 8-29), accompanied by an opinion of the neutral members (J.A. 30-88), the concurring views of the carrier members (J.A. 89-91) and the dissents of the labor organization members (J.A. 92-132). Although finding a large area of tentative agreement between the parties on the job protection to be accorded individual firemen, the Board found [13] "hopeless disagreement on the crucial questions" regarding the elimination of firemen's jobs and "no substantial structure of agreement" upon which to base an Award on that issue (J.A. 61, 50-52). The Board therefore found it necessary to "start from scratch" to reach its own conclusion as to the need for firemen and to develop a practical system to determine which jobs, if any, should be eliminated (J.A. 52). The Board found that the functions performed by firemen on locomotives (primarily lookout and maintenance) in most instances could be performed adequately by other members of the engine or train crew, without imposing an undue burden upon them and without undue hazard to lives and property (J.A. 54-58).

On the fireman issue, the Board's Award provides a procedure which could eventually eliminate up to ninety per cent of the fireman positions, subject to

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[13] Although the Award itself contains no findings of fact, the opinion of the neutral members set forth the facts which were found and which formed the basis for the Award in which the carrier members concurred.

provisions for the protection of individual firemen. In brief, each carrier is permitted to draw up a list of freight and yard engine crews which, in its judgment (based on considerations of safety, work burden and adequate transportation), do not require the services of firemen. The local chairman of the labor organization representing the carrier's firemen may, on the basis of the same considerations, and after conferences between the interested parties, designate up to ten per cent of the listed crews on which the carrier must continue to use a fireman (J.A. 12-14). His designation is to be binding. The remaining positions listed by the carrier are to be eliminated, subject to the rights of presently employed firemen.

Regularly employed firemen with ten or more years of service are entitled, under the Award, to continue in such employment until it terminates through natural causes, *i.e.*, death, disability, discharge for cause, retirement, etc. Regularly employed firemen with from two to ten years of service are entitled to continue in such employment until it terminates through natural causes, or until they are offered a comparable job for which they are or can become qualified, with relocation expenses, seniority rights and specified guaranteed annual earnings. Irregularly employed firemen with more than two years of service, and all firemen with less than two years of service, may be separated with a specified severance allowance (J.A. 14-20). Firemen who have not performed fireman or engineer service within two years may be separated without severance pay.

On the "crew consist" issue, the Board found large areas of tentative agreement, and therefore confined itself in general to developing and refining such agreements, resolving the remaining disagreements and ironing out details (J.A. 52-53). The Award provides a procedure for determining at the local level the composition of the train crews, under specified standards and guidelines, with complete job protection for those presently employed. Either a carrier or a labor organization may make proposals for change in the composition of the crew in main line road service, except where the crew consists of one conductor and two trainmen, and in yard and branch line road service, regardless of the present composition of the crew. If the parties cannot reach agreement, either may refer the dispute to a special board of adjustment, consisting of a carrier member, a labor organization member and a neutral member, to be selected by the two other members or, if they cannot agree, by the National Mediation Board. Costs of the neutral member and incidental expenses are to be shared by the parties, unless they agree upon different arrangements (J.A. 21-27). All trainmen, brakemen and helpers, except those on furlough when the Award becomes effective, are to retain their rights to employment until removed from the carrier's employee lists through natural causes (J.A. 19-20).[1]

3. *Proceedings in the courts below.* In accordance with the statute, the Board filed its Award in the

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[1] Secs. 4 and 5, Pet. App. 28a-29a.

United States District Court for the District of Columbia. Petitioners, who are three of the five labor organizations involved, filed one petition to impeach the Award, and a fourth labor organization [9] filed another. The fifth labor organization [10] did not challenge the Award. The carriers, the members of the Board, and the Attorney General were named as defendants, and the United States intervened as a defendant. The plaintiffs challenged the Award on numerous grounds, including the claim that Public Law 88-108 is unconstitutional, and the petitioners requested that a three-judge court be convened.

The district court refused to convene a three-judge court, and upheld the Award. The court ruled that three judges were not required because in substance the action was not to enjoin the enforcement of the statute, but to impeach and set aside the Award; and that the request for an injunction was therefore surplusage (Pet. App. 20a-21a). The court further denied the request for a three-judge court, on the ground that the constitutional issues which petitioners raised were insubstantial (J.A. 23a-25a).

On the merits the court held that Congress had authority to provide for an Arbitration Board to make a binding resolution of the dispute; and that since Public Law 88-108 set forth intelligible standards to guide the Board in making its determinations, there was no unconstitutional delegation of authority

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[9] Brotherhood of Locomotive Engineers.

[10] Order of Railway Conductors and Brakemen.

(Pet. App. 23a-25a). The court further held that the Board had complied with the statutory standards in reaching its decision, including the requirements that the Board incorporate the matters on which it found the parties were in agreement and that it gave due consideration to their tentative agreements (Pet. App. 16a-20a); and that its findings were supported by substantial evidence (Pet. App. 15a-18a).

The court of appeals (Judge Wright dissenting in part) affirmed on the basis of the district court's opinion (Pet. App. 1a-2a). All members of the panel agreed that the Award satisfied the standards of Public Law 88-108. The division in the court was over whether a three-judge court was required. The majority noted that, in addition to the reasons given by the district court, an injunction was unnecessary because there was no possibility of enforcement of the Award until after the courts had reviewed it (Pet. App. 2a).

Judge Wright's partial dissent rested on his view that under the judicial review procedure of Section 9 of the Railway Labor Act, which Public Law 88-108 expressly made applicable to the Award, questions as to the constitutionality of Public Law 88-108 could not be raised; and that the constitutional issues, which he did not identify or analyze, are "substantial" (Pet. App. 2a-4a).

In accordance with the judgment of the court of appeals (Pet. App. 4a-5a), judgment on the Award was entered in the district court pursuant to Section

9, Sixth, of the Railway Labor Act (45 U.S.C. 159, Sixth, Pet. App. 32a).[17]

ARGUMENT

We do not minimize the seriousness of the nationwide labor dispute underlying this litigation, nor would we question the importance or widespread impact of the arbitration Award. The questions of law, however, have been thoroughly reviewed and decided by two courts below, and they are not of a caliber justifying further review by this Court. Petitioners present no unsettled question concerning the need for a three-judge district court, and no substantial constitutional question. The statute providing for the arbitration has no general application and only limited prospective force; it provides merely for an Award upon two specific issues binding for two years. The concurrent decisions below are clearly correct.

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[17] The Award is presently in effect, except in regard to employees represented by petitioner, the Brotherhood of Locomotive Firemen and Enginemen. We are advised that that organization and the carriers entered into a stipulation under which the petitioner agreed to file its petition for certiorari by March 20, 1961, without seeking any stay in this Court, and to extend the effective period of the Award if it is held valid; and the carriers agreed not to implement the provisions of the Award, except those concerning the service of lists designating the crews in which the fireman was unnecessary, until 10 days after this Court's action upon the petition. A similar stipulation was entered into in the court of appeals between the two labor organizations representing firemen, and the carriers.

Except for the Award and its enforcement, Public Law 88-108 expired on February 25, 1961.

Further litigation would contribute nothing to the long-range settlement of labor disputes between the railroads and their operating employees. Consequently, there is no occasion for this Court's intervention.

1. Petitioners ask the Court to exercise its "supervisory jurisdiction" to determine whether this case should have been heard and decided by a three-judge district court (Pet. 15-20). The refusal of the courts below to convene a three-judge court was justified not only because of the insubstantiality of petitioners' constitutional challenge (*infra*, pp. 19-24), but also because the constitutional challenge arose in a context wherein the injunctive relief that is the predicate of the applicability of 28 U.S.C. 2282 was plainly unnecessary.

Decisions of this Court have established that when the constitutionality of a federal statute is questioned in a suit for review of an administrative decision which may be set aside without resort to an injunction against the operation of a regulatory program, a three-judge court need not be convened to pass upon the constitutional question. *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 152-155; *Thompson* v. *Whitaker*, 365 U.S. 465, dismissing appeal from 185 F. Supp. 306 (D.D.C.); *Flemming* v. *Nestor*, 363 U.S. 603, 605-608. As the courts below correctly held (Pet. App. 2a, 20a-21a), this is just such a case.

Congress provided in Section 4 of Public Law 85-108 that the Award would be subject to Section 9 of the Railway Labor Act (45 U.S.C. 159), which sets up a comprehensive and exclusive scheme of judicial review for railway labor arbitration Awards. Pe-

titioners, invoking that procedure, sought to impeach the Award on a number of statutory and constitutional grounds. Any judgment setting the Award aside on constitutional grounds would have nullified it, leaving nothing to be enjoined. There being nothing to enjoin, the convening of a three-judge court was not required. In short, the statutory procedure for judicial review of the Award rendered unnecessary the issuance of any injunction against the enforcement of either the Award itself or the underlying statute upon which it was based.

In these circumstances, it is irrelevant that petitioner's complaint sought (J.A. 271 J and 271 K), in addition to a judgment declaring that the statute and Award based thereon were unconstitutional, an injunction restraining the railroads from putting the Award into effect (Pet. 15-20). For where, as here, a single judge operating under a prescribed statutory review procedure can provide full relief against the operation of an unconstitutional statute by setting aside an order of an administrative body, a three-judge court need not be convened even though the

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In their motions to recall and stay the mandate of the court of appeals, petitioners themselves urged that the Award was not self executing and could not go into effect until after judgment was entered upon it. Moreover, apart from the question whether the Award was self-executing, it is clear that Congress set the time limits on the filing and effectiveness of the Award so that the courts would have an opportunity under the procedures of Section 9 to pass on its validity before it could go into effect. 109 Cong. Rec. (Aug. 26, 1963), pp. 15060-15061, and 109 Cong. Rec. (Aug. 27, 1963), pp. 15111 and 15112.

plaintiff also seeks an injunction against enforcement of the statute. *Flemming* v. *Nestor*, 363 U.S. 603; see, also, *Thompson* v. *Whittier*, 365 U.S. 465; *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 154.

Judge Wright in dissent concluded that the arbitration Award could not be impeached on constitutional grounds in a Section 9 proceeding, and therefore believed that a single judge could not grant full relief (Pet. App. 3a). Under his view, two separate actions apparently were necessary to challenge this Award: *first*, an action before a single judge under Section 9, with appeal to the court of appeals, to determine all statutory challenges to the Award and all questions of

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Petitioners state that the plaintiff in *Thompson* v. *Whittier*, 365 U.S. 465, "sought not an injunction but the setting aside of a ruling" (Pet. 17). That statement is erroneous, as we advised the court of appeals. See Brief for Appellees the United States, et al., in C.A.D.C. Nos. 18331-18334, p. 62. Plaintiff in that case "sought to enjoin the enforcement and execution of the Statute" he challenged. Jurisdictional Statement in *Thompson* v. *Whittier*, No. 500, O.T. 1960, p. 8; Motion to Dismiss, pp. 5-6; *Thompson* v. *Gleason*, 317 F. 2d 901, 903 (C.A.D.C.), on appeal from *Thompson* v. *Whittier*, *supra*, 185 F. Supp. 306 (D.D.C.). Similarly, in *Flemming* v. *Nestor*, *supra*, the plaintiff sought an affirmative order in the nature of an injunction. Record, No. 51, O.T. 1959, p. 2; Brief for Appellant, pp. 25-26.

Petitioners' reliance upon *Coffman* v. *Breeze Corporations*, 323 U.S. 316, *Florida Lime & Avocado Growers* v. *Jacobsen*, 362 U.S. 73, and *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U.S. 713, is misplaced. Since none of these cases involved suits to set aside or review an administrative decision, they do not derogate from the principle that a three-judge court need not be convened when a constitutional issue is raised in such a suit.

statutory interpretation; and, *second*, a separate proceeding before a three-judge district court, with direct appeal to this Court, to determine the constitutionality of Public Law 88-108.

Congress could not have intended to and did not provide such an anomalous and unmanageable procedure. The Section 9 proceeding was intended to be the exclusive method for judicial review of the Arbitration Board's decision,[21] and constitutional issues could be raised in that proceeding.[22] Where Congress

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[21] Sections 3 and 4 of Public Law 88-108 provided that, except for being subject to Section 9, the "award shall be binding" on the parties and "shall constitute a complete and final disposition" of the issues. Pet. App. 28a-29a. Section 9 itself provides that, unless an Award is challenged thereunder within 10 days after its filing, "the court shall enter judgment on the award, which judgment shall be final and conclusive." Section 9, Second, 45 U.S.C. 159 Second, Pet. App. 30a.

[22] Unless Congress specifies otherwise, the courts are presumed to have jurisdiction to determine constitutional issues. *E.g., Greene* v. *McElroy*, 360 U.S. 474; *Estep* v. *United States*, 327 U.S. 114, 120-123 and cases cited. For example, there was no express provision for judicial review for constitutional issues or questions of law in Section 205(g) of the Social Security Act, 42 U.S.C. 405(g), but this Court held that constitutional issues could and must be raised in that proceeding, and that a three-judge court was therefore unnecessary. *Flemming* v. *Nestor*, *supra*. Moreover, the language of Section 9, permitting the setting aside of the Award if it did "not conform, nor confine itself to the stipulations of the agreement to arbitrate" implies that the constitutionality of Public Law 88-108 could be challenged in the Section 9 proceeding, because, as all parties below agreed, that statute was the "agreement to arbitrate." If there were no constitutional statute, there would have been no valid agreement to arbitrate, and the Award would be invalid.

prescribes the method for judicial review, all issues, including constitutional questions, must be litigated there.[23]

Nor is there any merit to Judge Wright's belief that Section 9 forecloses review by this Court (Pet. App. 4a) and his consequent inference that constitutional issues must be raised by some other avenue (Pet. App. 4a). As petitioners demonstrate, this Court has jurisdiction under 28 U.S.C. 1254 to review all issues in a Section 9 proceeding (Pet. 28-29). Judge Wright was also concerned that the Section 9 proceeding would not afford petitioners adequate relief, because it would not prevent the enforcement of Section 1 of Public Law 88-108, which forbade for 180 days any change in the work rules and any strikes or lockouts (Pet. App. 3a). The short answer is that the petitioners never sought an injunction against the operation of Section 1.[24]

2. The insubstantiality of petitioners' constitutional challenge to Public Law 88-108 (Pet. App. 2a, 25a) provides an alternative basis for the refusal of the courts below to convene a three-judge district court

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[23] *E.g., Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752, 767, 772-773.

[24] Petitioners challenged only the features of Public Law 88-108 pertaining to the rendering of the Award, and requested only that the railroads "be permanently enjoined from *putting said award* in effect" (J.A. 271 J and 271 K; emphasis added). They did not challenge the constitutionality of Section 1; and any constitutional challenge to that Section would have been plainly insubstantial. *Wilson v. New*, 243 U.S. 332; *California Water Service Co. v. City of Redding*, 304 U.S. 252; *Jamison & Co. v. Morgenthau*, 307 U.S. 171.

and a dispositive answer to petitioners' contention that this case presents an important question of constitutional law (Pet. 20-27).

That Congress has authority to provide for the binding resolution of a labor-management dispute which would otherwise result in a crippling national railroad strike was settled by this Court's decision in *Wilson* v. *New*, 243 U.S. 332, and confirmed by later judicial and statutory developments.[20] In apparent recognition of this settled authority of Congress to fix wages, hours and working conditions in order to prevent such a strike directly, or "by appropriate legislation for compulsory arbitration" (*Wilson* v. *New*, *supra*, 243 U.S. at 351, 359),[21] petitioners expressly conceded

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[20] See, *e.g.*, *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U.S. 525, 535-537; and *Brotherhood of Railway Trainmen* v. *Chicago R. & I.R. Co.*, 353 U.S. 30 (sustaining and applying Section 3 of the Railway Labor Act, 45 U.S.C. 153 First (i), which provides for the compulsory arbitration, without strike, of disputes arising over the interpretation of existing collective bargaining agreements.)

[21] Congress unquestionably has authority to curtail an employee's right to strike, especially where the alternative would be a grave threat to health or safety: *United Steelworkers of America* v. *United States*, 361 U.S. 39; *Dorchy* v. *Kansas*, 272 U.S. 306, 311; *Milk Wagon Drivers' Union* v. *Meadowmoor Dairies*, 312 U.S. 287; *Carpenters & Joiners Union* v. *Ritter's Cafe*, 315 U.S. 722; *Gibboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490. See also, *Brotherhood of Railway Trainmen* v. *Chicago R. & I.R. Co.*, 353 U.S. 30; and *National Labor Relations Board* v. *Radio & Television Broadcast Engineers Union*, 364 U.S. 573.

There is no substance to the contention of the *amicus curiae* (Brief Amicus Curiae in support of petition, pp. 6-18) that there is a constitutionally-protected "liberty of contract" which is here impinged. *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U.S. 525.

in the courts below the authority of Congress to fix the terms and conditions of employment, or to commit that task to another tribunal under adequate standards (Pet. App. 23a; J.A. 333). Nor, apparently, do petitioners now challenge that Congressional power: They contend rather, that Public Law 88-108 constitutes a delegation of legislative power without adequate standards and safeguards (Pet. 22-27).

Public Law 88-108 was enacted for the sole purpose of resolving two narrow, and sharply defined issues[25] concerning the necessary manning of locomotives and trains. By the time of its enactment, the areas of disagreement between the parties had been narrowed, as Congress recognized, primarily by suggestions of the Secretary of Labor and resulting

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[25] Petitioners also contend that they had a constitutional right to have the Arbitration Board make findings of fact, and to judicial review of those findings for substantial evidence. There are no such constitutional requirements. *E.g., Switchmen's Union of North America* v. *National Mediation Board*, 320 U.S. 297; *Union Pacific R. Co.* v. *Price*, 360 U.S. 601, 615-616. In any event, the opinions set forth the facts which were found and which formed the basis for the Award (J.A. 30-91). Although the carrier members did not formally concur in the findings, their opinion reflects no disagreement with them, and they did concur in the Award (J.A. 89-91). All parties below, including petitioners, treated the findings of the neutral members as those of the Board. And the courts below ruled that the findings were supported by substantial evidence (Pet. App. 18a, 25a, 2a). Accordingly, the contentions of petitioners are academic.

[26] The issues and jurisdiction of the Board were defined in terms of the carriers' notices of November 2, 1959 and the organizations' notices of September 7, 1960. Sec. 3, Pub. L. 88-108, Pet. App. 28a.

negotiations (Pub. L. 88-108, Clause 6, Pet. App. 26a).

Public Law 88-108 directs the Arbitration Board, in resolving the two issues submitted to it, to incorporate "any matters on which it finds the parties were in agreement," and to give "due consideration to those matters on which the parties were in tentative agreement" and to "the narrowing of the areas of disagreement." Sections 3 and 7(a), Pet. App. 28a, 29a. Thus, Congress directed the Board to preserve any actual agreements it found, and to consider any progress that had been made through collective bargaining. In addition, the statute directs the Board to give "due consideration to the effect of the proposed award upon adequate and safe transportation service to the public and upon the interests of the carrier and employees affected." Sec. 7(a), Pet. App. 29a. In the context of the issues as previously defined by the notices of the parties, and their ensuing negotiations, Public Law 88-108 in effect directs the Board to consider the need for the fireman and train crew positions in the light of safe and adequate transportation service to the public, and to evolve a method for eliminating unnecessary positions in view of the interests of the presently employed employees as well as of the carriers.

Indeed the matters on which the parties had reached tentative agreement and agreement in principle were broad enough to provide the foundation for the Board's resolution of the entire train crew ("crew consist") issue, and the individual job security aspect of the firemen issue (see, *supra*, pp. 9-11).

That these provisions set forth ascertainable, intelligible policy directions and standards for decision, and that there has been no unconstitutional delegation of legislative power, seem scarcely open to dispute.[30] *American Power & Light Co.* v. *Securities and Exchange Commission*, 329 U.S. 90, 104-106; *Lichter* v. *United States*, 334 U.S. 742, 785. This Court has repeatedly sustained the constitutionality of statutes setting forth guidelines and standards much less instructive than those of Pub. L. 88-108.[31]

The only authorities relied upon by petitioners are three state court cases which involved statutes or ordinances for compulsory arbitration in which there were no standards whatsoever to guide the Arbitration Board (Pet. 23-24).[32] Similarly, the only two cases in which this Court has ever held acts of Congress to be unconstitutional delegations of legislative authority involved statutes which contained no standards whatever for determining under what circumstances, and how, such authority was to be exercised.[33]

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[30] There is, accordingly, no substance to petitioners' contention (Pet. 22) that the statute gave "uncontrolled discretion" to the Arbitration Board.

[31] See the opinion of the district court, Pet. App. 24a-25a, for a few examples.

[32] State statutes prescribing some standards for decision by the arbitration tribunal have been sustained against contentions of unconstitutional delegation. *E.g.*, *N.J. Bell Tel. Co.* v. *Communications Workers*, 5 N.J. 354, 75 A. 2d 720.

[33] *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, and *Schechter Poultry Corp.* v. *United States*, 295 U.S. 495. In his concurring opinion in the latter case, Mr. Justice Cardozo described

Whatever their present vitality,[30] they were wholly inapplicable here.

3. The Arbitration Board limited its Award to the two issues submitted for arbitration, incorporated the matters in which it found the parties were in agreement, and gave careful consideration to the matters on which the parties were in tentative agreement, and scrupulously followed the other mandates of Public Law 88-108, as a reading of its opinion (J.A. 39-88) discloses, and as all of the judges below agreed (Pet. 2a, 11a-20a). Since the courts below were clearly correct in rejecting petitioners' statutory attack upon the Board's Award, and Public Law 88-108 has no application to disputes other than those resolved by the Award, the statutory issues presented in this case do not warrant further review by this Court.

4. Congress adopted Public Law 88-108 to resolve a particular labor-management dispute by providing for a speedy, binding resolution of the two key issues underlying it (Public Law 88-108, Clauses 1-7, Pet. App. 26a-27a). The statute itself has already expired, except for the Award, which has a two year life (Sections 4 and 8, Pet. App. 29a, 30a). In adopting the legislation Congress specifically acted upon the agreement in principle of both parties to submit to bind-

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the legislation as a "roving commission" to the Executive, to "inquire into evils and then, upon discovering them, do anything he pleases." 295 U.S. at 551.

[30] See *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381, 399; *Parker* v. *Brown*, 317 U.S. 341, 352.

ing arbitration, and other circumstances peculiar to this case, and expressly restricted the scope of the statute so as not to set a precedent for governmental intervention in other labor-management disputes.[36] The narrow scope of this legislation—providing for binding arbitration of two issues in a particular dispute for a limited period—indicates that the case is not of sufficient general importance to warrant review by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1964

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[36] H. Rep. No. 713, 88th Cong., 1st Sess., p. 13:

> The committee believes that this legislation should not be considered as a precedent for congressional intervention in other labor-management disputes. This dispute is highly unusual, and the solution established by the legislation is, insofar as arbitration is concerned, a solution already agreed to in principle by the parties themselves.

Accord: S. Rep. 459, 88th Cong., 1st Sess., pp. 7-9.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 935

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, BROTHERHOOD OF RAILROAD TRAINMEN, AND SWITCHMEN'S UNION OF NORTH AMERICA,
Petitioners,

v.

CERTAIN CARRIERS REPRESENTED BY THE EASTERN, WESTERN, AND SOUTHEASTERN CARRIERS' CONFERENCE COMMITTEES, CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY, ET AL.
Respondents.

PETITIONERS' REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION TO PETITION FOR CERTIORARI

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Petitioners are tempted (as no doubt many petitioners are) to point out in reply to the Opposition Briefs many distortions and misrepresentations of our position; our arguments are easier to answer if they are first represented to be different from what they actually are. We shall trust that the Court under-

stands what we said in the Petition, as distinguished from what Respondents say we said.

Accordingly this Reply is limited to a brief clarification of our position on only two items.

I.

UNCONSTITUTIONALITY OF P. L. 88-108 WAS NOT AVAILABLE AS A GROUND OF IMPEACHMENT OF THE AWARD UNDER SECTION 9 OF THE RAILWAY LABOR ACT OR P. L. 88-108.

In seeking to sustain the decisions of the courts below the carrier respondents first cite a series of decisions of this Court on the three-judge-court requirement (Car. Br. pp. 22-24) none of which holds what it is represented as holding; then *Coffman* v. *Breeze Corp.*, 323 U.S. 316 is claimed (Car. Br. p. 26) to be consistent with the doctrine the carriers distill from these alleged holdings by ignoring the fact that the district court in that case dismissed the action for want of a justiciable controversy and lack of equitable grounds for relief. If the carriers were right in the doctrine they expound, this Court would not have held that a three-judge-court was required and that this Court therefore had jurisdiction of the direct appeal, but rather that a single judge should have dismissed the case on the ground that there was no case for equitable relief and that the appellate route was through the court of appeals.

After this preliminary argument the carriers (Car. Br. pp. 27-32) turn to what seems to us to be their primary ground for supporting the denial of our motion for the convening of a three-judge district court, i.e., that unconstitutionality of P. L. 88-108 is an available basis for impeachment of the award and hence the suit, despite Count II of the complaint, is not really one to which 28 U.S.C. § 2282 applies. The Government respondents rest their support of the

jurisdiction of a single district judge (aside from substantiality of constitutional issues) entirely on this ground. (Gov. Br. pp. 14-19). It is this contention to which we now reply.

Section 9, Third of the Railway Labor Act (Pet. App. p. 30a) explicitly provides that a petition for impeachment of an award "shall be entertained *only* on one or more of the following grounds:" (emphasis supplied). The grounds that follow are clearly defined and specific; unconstitutionality is not one of them.

Although P.L. 88-108 contains a separability clause (Pet. App. p. 30a) it does not enlarge the grounds for impeachment of the award beyond those specified Section 9, Third of the Railway Labor Act. It cannot be inferred from this clause, as the carrier respondents do (Car. Br. p. 31) that this clause must by implication have expanded the grounds for impeachment, for there are other provisions of the statute other than those pertaining to arbitration that are of questionable constitutionality and obviously not subject to consideration in an impeachment proceeding.

Both groups of respondents (Car. Br. p. 30; Gov. Br. pp. 18-19) ascribe Judge Wright's dissenting opinion on the three-judge-court requirement to his mistaken impression that the impeachment proceeding was not reviewable in this Court,* and imply that we ourselves have substantially abandoned Judge Wright's

* In this connection it may be pertinent to observe that during argument in the court of appeals, in response to questions from Judge Wright, while carrier counsel gave the opinion that impeachment issues were reviewable here on *certiorari*, Government counsel was not prepared to take an official position but expressed it as his personal opinion that the court of appeals decision would be final and all impeachment issues and not subject to review in this Court.

opinion by demonstrating that this Court has jurisdiction to review the impeachment issues on *certiorari*.

We submit that a fair reading of Judge Wright's opinion (Pet. App. pp. 2a-4a) shows that he put primary reliance on the considerations we have stated above and the availability of review in this Court was only a supporting bolster. We further submit that a fair reading of our petition (pp. 28-29) shows that we addressed ourselves, in this respect, only to the effect of Section 9, Sixth of the Railway Labor Act on the review jurisdiction of this Court to review an impeachment proceeding and did not imply that constitutional issues could be raised in an impeachment proceeding.

II.

THE "ARBITRATION" IMPOSED BY P. L. 88-108 BEARS NO RESEMBLANCE TO VOLUNTARY ARBITRATION.

These observations are addressed to the Government respondents' brief (pp. 24-25) indicating that Congress, in imposing on petitioners the novel requirements of subjection of the conditions of employment to be determined by an unfettered *ad hoc* Board, was only giving statutory form to what the parties had agreed upon "in principle". By contrast, the carrier respondents (Car. Br. p. 5) treat this so-called agreement "in principle" as only a minor deviation from the petitioners' alleged rejection of everything anyone had proposed.

Regardless of how individual members of Congress, or committees, may have sought to reconcile the imposition of compulsory arbitration with their consciences or their constitutional principles, the Congress as a whole found (in the last recital of P.L. 88-108, Pet. App. p. 26a) that the petitioners had accepted an arbitration proposal "with certain reservations" and that the

"parties have been unable to agree upon the terms and procedures of an arbitration agreement."

Arbitration imposed by Congress on terms it outlined and with the latitude the courts below have given it cannot be defended as merely implementing something the parties had agreed to "in principle".

Respectfuly submitted,

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April 22, 1964